Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

Arthur Hollander

Petitioner.

---- v ----

American Cyanamid Company

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED

1. Whether, as the Second Circuit has posited below, a plaintiff, in order to survive a motion for summary judgment, in an age discrimination case must show not only pretext, but also either use of pretext that itself implies a discriminatory stereotype, or use of pretext to hide age discrimination?

2. Whether evidence of pretext plus statistical evidence tending to show company practice of systematically eliminating older employees is sufficient to withstand summary judgment in an age discrimination case?

3.. Whether the fact that there are disagreements among the Circuit Courts and among the panels within the Circuits requires this Court to revisit the applicable standards to be applied in discrimination cases last considered in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) ?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioner Arthur Hollander prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit

OPINIONS BELOW

The opinion of the Court of Appeals affirming the judgment of the District Court is reported at 117 F.3d 192 and is reproduced in the Appendix to this petition at 35a.

The opinion of the the Court of Appeals reversing a prior summary judgment in 1990 is reported at 895 F.2d 80 and is reproduced in the Appendix to this petition at 1a.

The opinion and judgment of the District Court granting summary judgment in favor of the defendant is reported at 1999 F.Supp. 252 and is reproduced in the Appendix at 58a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on March 29, 1999. The Petition for rehearing was denied on May 24, 1999. The jurisdiction of this court is conferred by 28 U.S.C. Sec. 1254 (1).

STATUTES INVOLVED

This case invokes the Discrimination in Employment Act (29 U.S.C. Sec. 623 (a) as well as Federal Rule of Civil

Procedure 56, and Federal Rules of Evidence 401, 702. Relevant portions of these statutes appear in the Appendix at 107-08a.

STATEMENT OF THE CASE

Petitioner Arthur Hollander ("Hollander") sued American Cyanamid Company ("Cyanamid") where he had been employed in a managerial position for fifteen years, for violation of the Age Discrimination in Employment Act (ADEA) when he was discharged in 1984 at age 58. The district court granted summary judgment to Cyanamid in 1989 Hollander appealed that judgment to the circuit court which reversed the district court, granting Hollander the right to company-wide discovery to prove his case.

In reversing the district court, Judge Oakes, ruling in 1990 for the Second Circuit, prior to the panel's decision at issue here, stated concerning the new discovery the court authorized,

> "American Cyanamid's employment practices [are] relevant to Hollander's case. It is well settled that an individual disparate treatment plaintiff may use statistical evidence regarding an employer's general practices at the pretext stage to help rebut the employer's purported non-discriminatory explanation. [citing cases] Evidence relating to company-wide practices may reveal patterns of discrimination against a group of employees, increasing the likelihood that an employer's offered explanation for an employment decision regarding a particular individual masks a discriminatory motive. This case turns on the sincerity of American Cyanamid's claim that Hollander's abrasive personality justified his discharge,

> notwithstanding what Hollander depicts as American Cyanamid's fickle attitude toward this dimension of Hollander's job performance and the inability of a company supervisor to detail instances in which such problems impeded productivity. It is possible that Hollander's discovery request might uncover a pattern of older management employees leaving under unexplained circumstances which might help prove his claim that American Cyanamid's explanation for his discharge was pretextual." (9-10a)

With respect to the discovery that followed the court's decision, Cyanamid was not forthcoming in producing the information requested and Hollander protested both the slowness and the incompleteness of the discovery produced. Nonetheless, Hollander tendered evidence from an expert statistician, Dr. Marie Gaudard, PhD., a statistics professor at the University of New Hampshire. Dr. Gaudard showed that the company-wide statistics offered, though incomplete, established a pattern and practice of eliminating the job positions of older employees and further established, under statistical rules of probability, that older employees were eliminated from the work force in a pattern that established discrimination against older employees. (60-78a) Hollander himself produced evidence of title switching based on research in Cyanamid's personnel directories which he personally attested to as based on his own knowledge as an executive at the company for the preceding fifteen years.[1] He testified that the jobs purportedly eliminated, in fact survived,

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[1] Hollander had been employed at Cyanamid for four years in 1956. He returned to the company in 1973 and had a career with ever-increasing major job responsibilities, regular increases in salary, performance bonuses and stock option awards. In 1981, he was promoted to Manager Medical

frequently with significantly younger replacements. The statistical expert, produced by Hollander, surveyed all the information concerning the employment and termination of older employees in a systematic and scientific process, and concluded that

> "[t]he demographic data completely supports our original conclusion that the pattern of 'job eliminated' terminations, while facially age-neutral, disproportionately impacted older workers. To an extremely high degree of statistical certainty, age had to be a determining factor in the 'job eliminated' terminations." (61a)

The district court acknowledged that Hollander had established a prima facie case (24a) and had produced evidence of pretext accompanied by mendacity (27a).[2] Nonetheless it held this evidence insufficient on the basis that the "lying" could have been for some other [yet unspecified] non-discriminatory reason. (28a) The Court of Appeals affirmed the district court's decision. (59a)

In the first appeal to the Second Circuit, the court wrote that

> "[T]his case turns on the sincerity of American

Device Manufacturing with a significant salary increase and bonus and performed as management consultant until his discharge in 1984 (15a, 83a).

[2] The district court said "This court agrees with plaintiff that his evidence may in fact raise some doubt as to whether defendant's articulated reason for discharging him is believable." (27a)

Cyanamid's claim that Hollander's abrasive personality justified his discharge, notwithstanding what Hollander depicts as American Cyanamid's prior fickle attitude toward this dimension of Hollander's job performance and the inability of a company supervisor to detail instances in which such problems impeded productivity." (10a)

The Court went on to say:

> "Because employers rarely leave a paper trail -- or 'smoking gun' -- attesting to a discriminatory intent, ... disparate treatment plaintiff's often must build their cases from pieces of circumstantial evidence which cumulatively undercut the credibility of the various explanations offered by the employer. Such determinations are, generally speaking most competently made by the trier of fact. So long as the plaintiff can present 'solid circumstantial evidence' supporting his case ... he should have the opportunity to prove his case at trial." (10a)

Nonetheless -- the panel of the Second Circuit now under review in this petition held -- contrary to the first panel and in disregard of the results of the further discovery which exposed the pretext of Cyanamid in its allegedly legitimate reason for Hollander's discharge and in disregard of the added expert testimony further supporting Hollander's claim -- that the evidence ruled on by the prior panel as raising a factual issue as to the "sincerity" of Cyanamid, was insufficient. (58a)

The court below further affirmed the district court's motion to strike large portions of an extensive affidavit, the greater part of which was drawn from Hollander's personal

knowledge as an executive employee for at least the immediate previous eleven years, based on a claim that much of the affidavit was inadmissible hearsay.[3] Repeatedly the court struck relevant testimony which Hollander testified to, based on his own knowledge as a senior executive with knowledge of the workings of the company. He further countered claims made by other Cyanamid employees for their falsity, based on his own knowledge. Much of the striken testimony from Hollander's affidavit established in more detail the pretextual nature of Cyanamid's reasons for finding fault with Hollander's performance (79a et seq. where the striken parts of Hollander's affidavit are outlined in black).

REASONS FOR GRANTING THE WRIT

1. To Clarify the Weight to Be Accorded to the Facts that Comprise the Prima Facie Case in an Employment Discrimination Case Where the Plaintiff Has Established Pretext and/or Lying on the Part of the Employer and the Court Has Rejected Additional Testimony Which Could Establish a Discriminatory Reason.

In disposing of Hollander's claim summarily the court sets forth a new standard to be applied in ADEA cases which is contrary to the law established by this Court, and sets a precedent concerning summary judgment and the establishment of a prima facie case. Such holding requires review because of its importance to litigants and courts dealing

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[3] The entire affidavit appears in the appendix commencing at 79a.

with these issues throughout the nation on a daily basis. The court below incisively ruled:

> "Various items make up the first category (non-statistical) of evidence on which Hollander relies. Hollander offered affidavits from former co-workers stating that he was not difficult to work with and may not have been responsible for the alleged unionization incident cited by Cyanamid. Hollander also stressed the fact that, at his deposition in 1986 and 1987, Duckett could not remember a single event that led to the scathing 1983 review of Hollander in which Duckett wrote that Hollander left a "trail of wreckage" in regard to interpersonal relationships. In addition, Hollander offered letters from employees at Cyanamid -- including Duckett -- complimenting his efforts as Manager of Medical Devices. (49a)

> "We need not decide whether Hollander offered enough evidence to establish that Cyanamid used his allegedly poor interpersonal skills as a pretext for its true reason for terminating him. Assuming arguendo that he did, this is far from the end of the matter, for to survive summary judgment, Hollander had to show not only pretext, but also *either use of pretext that itself implies a discriminatory stereotype, or use of a pretext to hide age discrimination.* This he did not do." (49a)

In this decision, the Second Circuit has proposed a new standard for plaintiffs in discrimination cases which is at odds with a long line of discrimination cases in this Court. This new standard was suggested, if not stated, for the first time in *Fisher v. Vassar,* 114 F. 3d 1332 (2d Cir. 1997) (in

banc) *cert. den.* 118 S. Ct. 851 (1998).

In a series of cases beginning with *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), this Court has created a carefully balanced evidentiary framework to be used in discrimination cases. The framework is designed to afford an opportunity to plaintiffs claiming intentional discrimination to learn the reasons for the employer's action prior to proving intent while safeguarding employers against frivolous claims. Under these precedents only those plaintiffs can prevail who can show that the employer's explanation is mendacious. *McDonnell Douglas,* 411 U.S. at 802. As this Court made clear in *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 253-54 (1981):

> "[t]he prima facie case serves an important function in the litigation; it eliminates the most common non-discriminatory reason for the plaintiff's rejection... Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in face of the presumption, the court must enter for the plaintiff because no issue of fact remains in the case."

Moreover, the burden placed on the defendant is not a burden of proof, but rather a burden of production. The *Burdine* Court observed:

> "The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate non-discriminatory reason.

> The defendant need not persuade the court that it was actually motivated by the proffered reasons ... It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." 450 U.S. at 254-55.

The Court went on to reject as unlikely the Court of Appeals' fear that "[i]f an employer need only *articulate* -- not prove -- a legitimate, non-discriminatory reason for his action, he may compose fictitious, but legitimate, reasons for his actions." 450 U.S. at 257-58. And in *U.S. Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 714-15 (1983), this Court spelled out the remaining requirements of the evidentiary framework after the defendant had articulated non-discriminatory reasons for its action.

> "When the defendant fails to persuade the trial court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for plaintiff's rejection, the factfinder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage the *McDonnell Douglas-Burdine* presumption 'drops from the case' [and] 'the factual inquiry proceeds to a new level of specificity." *Aikens,* 460 U.S. at 715, quoting *Burdine.* 450 U.S. at 255, n.1

This Court resolved the conflict among the circuits in *St. Mary's* by making clear that once the defendant has produced *evidence* (whether ultimately persuasive or not) of non-discriminatory reasons, 509 U.S. at 509, the burden of persuasion that remains with plaintiff is not satisfied by a demonstration that the employer's reason was false. The

court observed "[n]othing in the law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employee's explanation of its action was not believable." 509 U.S. at 514-15. Instead, "proving the employer's reason was false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination." 509 U.S. at 511.

The *St. Mary's* Court carefully refrained from requiring the plaintiff to produce additional evidence of intentional discrimination. Rather it stated that "[t]he factfinder's disbelief of the reasons put forward by the defendant, (particularly if the disbelief is accompanied by a suspicion of mendacity) may, together with the elements of a prima facie case, suffice to show intentional discrimination." The approach taken in this case by the court below does not respect the careful balance established by this Court in its previous decisions. The case at bar concerns the affirmance of a summary judgment motion where the court below stated:

> "While the district court found that evidence submitted by Hollander 'may in fact raise some doubt as to whether Cyanamid's articulated reason for discharging him is believable " 999 F. Supp. at 258, it held that no reasonable jury could conclude that, based upon the evidence, Hollander was a victim of age discrimination ... [W]e agree." (48a)

The court below, moreover, went even further as cited *infra.*, page 7.

> "Hollander had to show not only pretext, but also *either the use of pretext that itself implies a discriminatory stereotype, or use of pretext to hide discrimination.* This he did not do (emphasis in the original opinion) (49a)

This new standard established as law in the Second Circuit is at odds with the line of cases from this Court cited above, and adds an additional hurdle to the proof required by *St. Mary's*. There this Court specifically said, in contradiction to the new standard set by the court below, that "rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and ... no additional proof of discrimination is *required." St. Mary's,* 509 U.S. at 511 (emphasis in the original)

Based on the law that this Court has previously established, the apparent acceptance by the Court of Appeals that the reasons given for Hollander's discharge -- his abrasive personality -- when weighed against the evidence he produced concerning his raises and prior approval ratings, and the fact that the supervisor who gave him a scathing review of his performance could remember no particulars or specific facts concerning his negative conclusions, could well support a finding of pretext, Hollander presented a case which should have gone to the jury. Without the additional evidence he proffered concerning the statistics, however, the pretext established did not in and of "itself impl[y] a discriminatory stereotype," or expressly say it was "a pretext to hide age discrimination." Thus under its new standard, the court below could justify its grant of summary judgment.

The court below relied on language from *Fisher* that`

"[D]iscrimination does not lurk behind every inaccurate statement. Individual decision-makers may intentionally dissemble in order to hide a reason that is non-discriminatory but unbecoming or small-minded, such as back-scratching, log-rolling, horse-trading, institutional politics, envy, nepotism, spite, or personal hostility. In short, the fact that the proffered reason was false does not necessarily mean that the true motive was the illegal one argued by the plaintiff." 114 F. 3d at 1337-38 (50,51a) [4]

Petitioner presented additional support of his age discrimination claim in the form of expert statistical evidence demonstrating by analysis of "job eliminated" terminations over a period of 1981 to 1991 (including 1984-1989) which showed a pattern to a high degree of statistical certainty that age was a determining factor in the "job eliminated" terminations. These statistics were further bolstered by Hollander's own analysis. This evidence was excluded from consideration by the district court and that decision was upheld by the court below as an appropriate exercise of judicial discretion.

A. The Standard of Proof Applied by the Second Circuit

For the first time since *St. Mary's* and before, a new standard of proof was applied in Title VII/ADEA discrimination law by the Second Circuit in *Fisher v. Vassar,*

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[4] The circuit court below could have accepted the evidence adduced on the prima facie case to be sufficient in presenting a factual issue; instead it deplored what it saw as Hollander's failure to produce anecdotal evidence of management's specifically and explicitly targeting his age; because that was lacking, the summary judgment was upheld. (51a)

a district court judge puzzled over the standard. That judge said that the *Fisher* court's definition of a prima facie case in employment law was so unclear that it reminded him of the Cheshire Cat in *Alice in Wonderland* that vanishes and leaves only its smile. See *Bickstaff v. Vassar,* 992 F. Supp. 372, 373-4 (SDNY 1998) [5]

Judge Winter in a dissent in *Fisher* importuned this Court to clarify the law in this field. He reviewed at length the various opinions of the other judges of the court in the in banc review which he referred to as a "cut-and-paste" analysis of Title VII decision of this Court. He suggests there that the concepts of prima facie case, presumption, burden of production and pretext be abandoned and that this Court reanalyze the issues in accord with other concepts of the law. 114 F. 3d at 1386.

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[5] The *Fisher* decision has occasioned other panels of the Second Circuit to arrive at inconsistent results in deciding summary judgment motions as well as ruling on jury findings cf. *Pollis v. The New School for Social Research,* 132 F. 3d 115 (2d Cir. 1997) [plaintiff's verdict under Title VII reversed on grounds of no showing of intentional discrimination]; *Stern v. Trustees of Columbia University,* 131 F.3d 305 (1997) [Summary judgment for defendant reversed in race discrimination case brought by white male]; *Hawkins v. Astor Home for Children* (1998 U.S. Dist. LEXIS 3599 [summary judgment granted because despite pretext there could be another possible reasons for a false explanation]; Raskin v. Wyatt, 125 F.3d 55 (2d Cir. 1997) [summary judgment affirmed despite anecdotal evidence concerning age in ADEA case brought by company actuary]; *Danzer v. Norden Systems, Inc.* 151 F.3d 50 (2d Cir. 1998) [Summary judgment for defendant reversed following the burden shifting framework of *McDonnell Douglas* and mixed motive framework of *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989); rule of *Fisher* not followed as pointed out in dissent.].

Judge Winter seems most concerned that an employer in a discrimination case can rebut the plaintiff's prima facie case with a dishonest reason for the alleged act of discrimination and by so doing, defeat the plaintiff's case at the summary judgment stage. The judge summarized his frustration with the majority's failure to apply fundamental principles of criminal law involving dishonesty and consciousness of guilt.

> "My colleagues hold that this principle [consciousness of guilt] does not apply to employers or, perhaps, that *it no longer applies to any party to litigation,* including criminal defendants." Id at 1390 (emphasis added)

The ruling in this case continues to confuse the Circuit Courts of Appeal, not only in the Second Circuit, but in the majority of the Circuits arising from confusing signals which the courts must have received from *St. Mary's.* See *infra,* p. 21.

2. To Clarify the Standard that a Trial Court Should Apply in Discrimination Law concerning that Court's Function as a "Gatekeeper" with Respect to the Proffer of Statistical Evidence to Support the Plaintiff's Case

This Court in *Castinada v. Partida,* 430 U.S. 483 (1977) and *Hazelwood School District v. United States*, 433 U.S. 299 (1977), established that a plaintiff in a discrimination case could effectively prove his/her case through statistical evidence.

> "Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination."

In *Bazemore v. Friday, 478 U.S. 385, 402 (1986),* this Court further stated that a plaintiff in a discrimination case "need not prove discrimination with scientific certainty; rather his or her burden is to prove discrimination by a preponderance of the evidence."

Hollander offered two kinds of statistical evidence which supported his prima facie case of discrimination on account of age in the overall work force at Cyanamid. One involved a study by an expert professor of statistics (the Gaudard Report) which analyzed the termination of Cyanamid managers of level 9 and higher from ages 40 through 69 and determined that, notwithstanding entries of the neutral term "job eliminated" these terminations disproportionately impacted older workers, and that therefore, to an extremely high degree of statistical certainty, age had to be a determining factor in the "job eliminated" terminations. (61a) Particularly, the report posited that the demographic data indicated that the age 50-59 managerial force experienced a larger decrease in percentage during the relevant period when Hollander's employment was terminated. (67a)

The second kind of statistical evidence produced by Hollander involved his own analysis of pattern evidence of a sample which included 26 terminations in cases of managerial employees where Cyanamid made changes in job title and used the term "job eliminated' as the stated reason. Hollander's assertions were based on his own knowledge, that in fact the jobs were not eliminated or substantially changed and that in half of them, younger replacements were hired, i.e. the terminated manager having had a title of "Manager National Accounts" was replaced by a younger manager with the new, transposed title of "National Accounts Manager."

Other deceptive techniques used synonymous titles, temporary titles, later changed to the old titles -- all of these techniques established Cyanamid's pattern of pretext to hide discrimination against older employees terminated on the grounds of their jobs being eliminated.. (104-105a)[6]

Both of these categories of evidence were relevant to the issue which concerned Cyanamid's pattern and practice of discharging older employees by recording them as "job eliminated." The statistics established this pattern and practice and were relevant to Hollander's case of age discrimination.

The *St. Mary's* Court cited an example of an employer's general employment practices as relevant to a discrimination claim by stating:

> "Where an employer has a strong record of equal opportunity employment, any inference of discrimination arising from the discrediting of the employer's explanation may be a weak one." 509 U.S. at 513

Accordingly, the opposite corollary of a record of deceptive large-scale employment termination of older employees has equal relevance in making a discrimination plaintiff's case.

The court below, following the findings of the district court, disregarded the obvious relevance of this evidence. It

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6 The Appendix reference concerns Hollander's affidavit testimony which was striken by the district court because, said the court, it was hearsay despite Hollander's representation that he was himself a manager and that the affidavit was made on his "personal knowledge." (79a)

upheld the ruling of the district court on the ground that the district court did not abuse its discretion in barring the evidence. In taking this tack, the court below deprived Hollander of the additional evidence which concerned proof of the pretextual reasons given for his job termination.[7] Moreover, this ruling was further in contradiction to the same court's decision reversing a prior summary judgment, See p. 2 *infra.*

A. The Gaudard Report

The court below stated "plaintiff may not gerrymander data in order to achieve his desired result." (31a) [8] Far from manipulating facts to reach an unwarranted conclusion, the Gaudard report based its conclusion on data drawn from Cyanamid's *entire* age group of employees and compared it with the accepted demographic data to reach its conclusions. (60-61a)

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[7] In Hollander's specific case, Cyanamid did not give the reason for his termination as "job eliminated." Hollander's expert testimony and his own on this issue, however, described a company policy, not otherwise challenged, of terminating older employees and stating the reason to be "job eliminated." That the company did not give this as the reason for Hollander's discharge does not deprive evidence of Cyanamid's overall conduct toward older employees of the relevance of that evidence to his case. The district court below, affirmed by the appellate court, stated that the fact that Hollander's discharge was not recorded as "job eliminated' deprives Hollander of any reliance on an expert's analysis of a company policy which rid the company of aging employees (32a)

[8] The meaning of "gerrymander" as defined in Webster's Dictionary, Second Edition is "to manipulate facts, arguments etc. in order to reach unwarranted conclusions"

The court below accepted the flawed reasoning of the district court that, because Hollander was not discharged on the grounds of "job eliminated," he could not rely on statistics concerning a pattern and practice at Cyanamid of discharging other employees on those grounds to show a pattern and practice of discharging older employees.

In *Daubert v. Merrill Dow Pharmaceuticals,* 509 U.S. 579, 592-93 (1993), this Court described the district court's role as "gatekeeper" with respect to expert testimony. For expert testimony to be admissible it must help the jury "to understand the evidence or to determine a fact in issue" *Daubert* 509 U.S. at 591 (quoting Fed. R. Evid. 702). This is in essence a relevance standard. See Fed. R. Evid. 401. Hollander submits here that the relevance of both categories of evidence excluded meets the relevance test *cf. Sobel v. Yeshiva Univ.*, 839 F.2d 18, 35 *Cert. den.* 490 U.S. 1105 (1988).

The court below disposed of the Gaudard report on the grounds that its inference of discrimination was based solely on "raw numbers." Statistics, however, derives their punch from numbers and statistical conclusions are drawn by demographers based on an analysis of what others might deem "raw numbers." If the demographic curve drawn by the statistician (as in this case) showed a dramatic increase in those who were terminated in the employ of Cyanamid between the ages of 50 and 59, it is reasonable to draw certain conclusions from these statistical data.[9] The court disposed

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[9] The Gaudard Report's conclusions were based on analyzing and comparing the age distribution of those terminated with the age distribution of those employed to determine whether an anomaly existed .. using accepted statistical methodology (i.e. standard deviation, mean, avg, binomial analysis, confidence intervals, and probability factors (74 - 78a).

of the issue by simplistically stating that Hollander's expert had failed to show "causation." The missing "causation" becomes the conclusion which ineluctably follows from the undisputed facts concerning the Cyanamid workforce and its systematic termination of the employment of older managerial employees.

Further, in a separate part of the report, "Statistical Analysis Of Termination Data and Descriptive Data" (67-78a), Dr. Gaudard eliminated from a group of 1300 senior managers terminated for specific reasons, arriving at a group of 245 managers who had been involuntarily terminated because Cyanamid had eliminated their jobs.

Dr. Gaudard analyzed the *entire* group (40-69) of the job eliminated terminees, and then tested her findings with the older segments -- namely the 60-69 group (73a) and the 55-69 group (74a) -- an accepted statistical technique. Her conclusion was that the probability of these terminations occurring by chance alone was 1 in ten trillion and that age was the statistically significant factor in these terminations. (78a) The court rejected these findings based on various conjectures of alternative scenarios. (54-57a)

B. Hollander's Own Statistical Evidence

The court discounted Hollander's own statistical evidence which, taken from the company directories, posited that a sample of 26 positions out of the 245 "job eliminated" positions still exist and were filled by employees significantly younger than those who left because the job was eliminated. The court below speciously challenged this evidence because,

the court said, "[Hollander] is unable to show that the younger employees in those positions are truly replacements who actually performed the same duties as the terminated managers whom Cyanamid allegedly mischaracterized as "job eliminated." (57-58a) Hollander identified six instances where the "replacements" bore the same job title and fit into the identical reporting structure after the jobs had first been eliminated. Other instances were shown in Hollander's affidavit at 104a, 105a. Hollander urged before the court below that these job eliminations and title changes evidenced a pattern of dishonesty relevant to his age discrimination charge.

Finally the court concluded that the Report depends on a "misleading age grouping that impermissibly skews the data in Hollander's favor." (56a) In drawing this conclusion, the court pointed to managers aged 60-69 who had their jobs eliminated at a much higher rate than other managers. In its rejection of this offer of expert testimony, the court below ignored the fact that this evidence was offered against a summary judgment motion. The record is bare of any counter to this evidence by Cyanamid. Certainly, even if flawed, the evidence represents a compelling statistical description of Cyanamid policies that appear to embody a prejudice against the employment of older managerial employees.

3. To Resolve a Conflict in the Circuits with Respect to a Plaintiff's Burden of Proof in a Discrimination Case (Title VII/ADEA) Following *St. Mary's Honor Center v. Hicks* [10]

In *St. Mary's Honor Center v. Hicks* 509 U.S. at 511, this Court held in a much-quoted statement:

> "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of a prima facie case, suffice to show intentional discrimination."

This statement in *St. Mary's* has been relied on by plaintiffs who have only evidence of pretext at the summary judgment stage, to argue that summary judgment should not issue -- particularly where the mendacity or dishonest reason for the employer's actions are clearly provable. There is, however, a serious disagreement among the Circuit Courts on this issue which require this Court's instruction.

In *Aka v. Washington Hospital Center*, 156 F.3d 1284, (USDC 1998) (in banc) the court attempted to reconcile the diverging positions of other Circuit Courts of Appeal on the significance of a prima facie case. There, Judge Wald for seven members of the Court, with four judges in two opinions vigorously dissenting, reversed a summary judgment in an age discrimination case, which also involved a second issue under the Americans with Disabilities Act.

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[10] The evidentiary framework for proving age discrimination is the same as that for proving discrimination under Title VII. See *Raskin v. Wyatt Co.*, 125 F.3d 55, 60 (2d Cir. 1997) *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 913 (2d Cir. 1997).

The court there cited *St Mary's* for the proposition that a number of circuits courts in the Third, Sixth, Seventh, Ninth and Tenth Circuits, relying on that decision, held that a "plaintiff can always succeed in fending off summary judgment if he can demonstrate a genuine issue of material fact as to whether the employer's stated reason for its employment decision is the real reason. *See, eg. Sheridan v. E.I. DuPont de Nemours & Co.,* 100 F.3d 1061, 1066-72 (3d Cir. 1996) (in banc); *Kline v. Tennessee Valley Authority,* 128 F.3d 337, 342-47 (6th Cir. 1997); *Anderson v. Baxter Health Care Corp.,* 13 F.3d 1120, 1123-24 (7th Cir. 1994); *Washington v. Garrett,* 10 F.3d 1421, 1433 (9th Cir. 1993); *Randle v. City of Aurora,* 69 F.3d 441, 451 (10th Cir. 1995)" 156 F.3d at 1289-90.

Judge Wald found other circuit in disagreement with this reading where "genuine issues of material fact as to the falsity of the employer's explanation will not suffice alone to avoid summary judgment," citing: *Hidalgo v. Overseas Condado Insurance Agencies, Inc.,* 120 F.3d 328, 335-37 (1st Cir. !997); *Fisher v. Vassar,* 114 F.3d at 1335-38 [11] *Rhodes v. Guiberson Oil Tools,* 75 F.3d 989, 994 (5th Cir. 1996) (in banc); *Ryther v. KARE II,* 108 F.3d 832, 836-37 (8th Cir. 1997) (in banc)[12]

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[11] In a footnote concerning *Fisher,* Judge Wald places the *Aka* , court in accord with *Fisher* as in the middle between the two different views of Circuit courts with respect to the effect of the prima facie case, even though the effect of the *Aka* decision is to reverse a summary judgment for an employer whereas the Second Circuit in *Fisher* reversed a trial judge's expressed finding for plaintiff of pretext plus discrimination after trial. 156 F.3d 1290 n. 5

[12] It is no accident with respect to the issues posed to this Court in this Petition that so many of the decisions of the Courts of Appeals which are

One of the problems facing the plaintiff against whom summary judgment is sought is basic to the employee / employer relationship. At the pre-trial phase of a case concerning a negative employment decision, and even at trial with all the discovery that the court permits available, acquisition of persuasive evidence of the claimed illegal negative decision is often difficult to obtain. It is on this premise that the special rules surrounding the prima facie case and the *McDonnell Douglas - Burdine - Aikens* rules have been developed to permit a plaintiff to prevail in an otherwise difficult situation. As this Court said in *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577 (1978)

> "A prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our ex, erience that more often than not people do not act in a totally arbitrary manner, without the underlying reasons, especially in a business setting. Thus when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's action, it is more likely than not the employer, who we generally assume acted with *some* reason, based his decision on an impermissible consideration such as race."

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so divided among the Circuits and among the judges sitting in those courts that they are "in banc" and that they reflect profound disagreements concerning the law in this field .

The issue posed by this case concerns the need for this Court's direction in employment discrimination cases. On the one hand the First, Second (at least in this case) Fifth and Eighth Circuits are joined in requiring more of a plaintiff to defeat summary judgment than a prima facie case, plus evidence of pretext (dishonesty) and the Third, Sixth, Seventh, Ninth, Tenth and D.C. Circuits follow the dicta in St. Mary's permitting a plaintiff possibly and sometimes to defeat summary judgment by proving a prima facie case, plus showing a dishonest reason for the employment decision. The District of Columbia Circuit with its in banc decision in *Aka* says it agrees with Fisher in a middle position , but the fact is the divided court reversed a summary judgment for an employer by holding that there was a genuine issue of material fact from which the factfinder could infer discrimination.

Not given adequate consideration in this confusion of positions is the issue of an employer's dishonesty, another term for "pretext." In *Fisher*, Judge Winter dissenting stated concerning the majority opinion there that this

> "puzzling ruling is ... at odds with the vast body of law allowing inference of consciousness of guilt to be drawn from dishonest behavior concerning facts material to litigation. For example, it is -- or was until now -- settled law that a false exculpatory statement by a defendant may (not must) support an inference of consciousness of guilt. [O]ne of the most routine of jury instructions -- perhaps given hundreds of times by my colleagues in the majority who are former district judges-states that if a jury finds that a witness has lied in a material part of his or her testimony, the jury may (not must) disbelieve other material parts of the witness's

testimony." 114 F.3d at 1390.

Judge Wald in *Aka* follows Judge Winter's reasoning.

> "If the jury can infer that the employer's explanation is not a mistaken one in terms of the facts, but a lie, that should provide even stronger evidence of discrimination. This is so because, according to ordinary evidentiary principles (which we have been instructed to apply in employment discrimination cases *see Aikens,* 460 U.S. at 716) ... , a lie is evidence of consciousness of guilt." 156 F.3d at 1293

The standard that emerges from the court's decision in the case at bar and *Fisher* in the Second Circuit appears to be that pretext or a lie on the part of the employer is not enough for a plaintiff to prevail on summary judgment because some unknown reason, not known or to be known could be the real reason. Moreover at the summary judgment phase the plaintiff *must* have affirmative evidence of discriminatory intent if the employer gives a neutral reason (even though false) for its action. Under the *McDonnell Douglas* minuet, if the employer remains silent, the plaintiff wins; however, if the employer responds with an untrue reason -- any lie will do -- that employer is then entitled to summary judgment. If indeed this is the message of *St. Mary's*, this Court should make this clear; if it is not, this Court should say so. In either event, this case raises the issue squarely -- an issue that all Circuit Courts are facing today with an increase in filings in the district courts of employment discrimination claims. And most significantly, the Circuit Courts of Appeal are in wide divergence and conflict in their decisions on this issue as shown in detail above.

CONCLUSION

This Court should grant the Writ of Certiorari to the Second Circuit Court of Appeals to hear and decide the important issues posed.

Respectfully submitted,

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Dated: New York, N.Y.
August 21, 1999

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

(Argued: Sept. 27, 1989 Decided: Jan. 30, 1990)
Docket No. 89-7402

Arthur Hollander,

Plaintiff - Appellee., pro se

- -v. --

American Cyanamid Company

Defendant - Appellant

Before: OAKES, Chief Judge, and
PIERCE and RUBIN,* Circuit Judges

OAKES, Chief Judge:

Arthur Hollander appeals from a summary judgment of the United States District Court for the District of Connecticut, Warren W. Eginton, Judge, granting Hollander's former employer, American Cyanamid Company, summary judgment on Hollander's claims under the Age Discrimination in Employment Act, 29 U.S.C. §§ 623 et seq. (1982 & Supp. V 1987), and dismissing his Connecticut state law claim for tortious interference with a business expectancy. We affirm in part, vacate in part, and remand.

* Of the U. S. Court of Appeals for the Fifth Cir. sitting by designation.

Argued By:

ARTHUR HOLLANDER, appellant, pro se

ALBERT ZAKARIAN, Day, Berry & Howard, Hartford Conn., for appellee.

BACKGROUND

In 1973, Hollander was hired by American Cyanamid as Manager of Management Engineering for its Lederle Laboratories and Davis & Geck Divisions in Pearl River, New York. By most indications, Hollander performed well in this capacity. From 1973 to 1980, he consistently received salary increases, bonuses, and stock options: company job evaluations noted that he "excels in several areas."

In 1981, American Cyanamid promoted Hollander to the position of Manager of Medical Devices at the Davis & Geck facility in Danbury, Connecticut. Hollander's duties in large part involved overseeing projects leading to the development of a skin stapler designed to replace traditional sutures and of a hemostat designed to prevent bleeding during operations. Hollander continued to enjoy solid job performance evaluations, with his 1980 rating giving him a "+" designation for "excel[ing] in several major areas, with his 1981 rating reporting that he "excels in several major areas," although without the "+"; and with his 1982 rating stating that Hollander "achieves expected results." As a measure of his success, Hollander received additional bonuses and stock options during 1981 and 1982.

For some time, however, negative assessments of Hollander's interpersonal skills slightly tarnished the otherwise positive appraisals of his job performance. While for most categories Hollander was graded as either "consistently acceptable" or "superior" his ratings in both

"communications" and "human relations" hovered somewhere between "consistently acceptable" and "needs improvement." Starting in 1982, company evaluations began to place increasing emphasis upon his problems in getting along with his co-workers. A 1982 progress report made specific mention of how Hollander's interpersonal difficulties impeded successful job performance.

In 1983, Hollander's job rating turned quite sour. He was said to need improvement in five categories - human relations, communications, personal development, leadership, and organization and staffing. Detailed written comments described his management style as so abrasive that it undermined employee morale and endangered project success. Hollander's overall job performance was evaluated as "needs improvement," the lowest of the three possible categories. Hollander's supervisors recommended finding him work elsewhere in the company, not involving interaction with other people.

On January 30, 1984, American Cyanamid relieved Hollander, then fifty-seven years old, from his responsibilities as Manager of Medical Devices. Hollander was retained for six months, while the company unsuccessfully tried to locate him other work. He was discharged permanently on August 1, 1984. According to Hollander, he was replaced by Richard Augsbach and Felix Esposito, approximately one and eleven years younger than Hollander, respectfully, Hollander contends that the unfavorable job evaluations were used to conceal American Cyanamid's desire to ease him out of the company because of his age.

On July 10, 1984, Hollander filed age discrimination complaints with the Connecticut Commission on Human Rights and Opportunities (CCHRO) and the Equal Employment Opportunity Commission (EEOC). In October

1984, Hollander contacted Ethicon, Inc., a rival medical device manufacturer, to seek employment. In his discussion with Ethicon, Hollander offered to show the company a film demonstrating the application of automation to suture manufacturing. The parties dispute whether the film contained proprietary information belonging to American Cyanamid. Ethicon contacted Robert Duckett, Hollander's former supervisor at American Cyanamid, regarding both the film and Hollander's application. On October 26, 1984, Gil Seal, Director of Operations with Davis & Geck, wrote Hollander, stating that the position Hollander was pursuing with Ethicon was inconsistent with a non-competition covenant Hollander had signed in 1973 and that Hollander's offer to show the film transgressed American Cyanamid's proprietary rights. Without mentioning the non-competition agreement, Ethicon wrote Hollander on October 22, 1984, to indicate that it would not be offering him a position.

On March 17, 1985, Hollander filed a second agency complaint, alleging that American Cyanamid had attempted to block Hollander's efforts to secure employment with Ethicon in retaliation for Hollander's filing of the initial discrimination complaint.

Neither the CCHRO nor the EEOC acted upon Hollander's complaints. Hollander then filed suit on August 23, 1985, in the United States District Court for the District of Connecticut, claiming that American Cyanamid discharged him in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §623(a)(1) (1982), and then retaliated against him for advancing his initial complaints before the state and federal agencies, also in violation of the ADEA. Hollander additionally contended that American Cyanamid's alleged retaliation amounted to a tortious interference with a business expectancy under Connecticut state law. Finally, Hollander charged that American

Cyanamid's practices violated federal and state antitrust laws and state law prohibitions on unfair trade practices. Hollander subsequently dropped these latter three claims.

On March 23, 1989, the district court granted American Cyanamid's motion for summary judgment on the ADEA claims. As to Hollander's claim of a discriminatory dismissal, the district court held that Hollander had failed to produce any evidence tending to show a nexus between his age and the reason for his discharge. The district court also found Hollander's retaliation claim lacking in evidence linking American Cyanamid's conduct regarding Hollander's attempt to secure employment with Ethicon to Hollander's earlier filing of discrimination charges with the CCHRO and the EEOC. Finally, because Hollander's federal claims had been disposed of at summary judgment, the district court dismissed Hollander's remaining pendant state law claim as lacking a sufficient jurisdictional basis.

On appeal, Hollander challenges generally the grant of summary judgment in favor of American Cyanamid and specifically the district court's refusal to compel American Cyanamid to answer an interrogatory asking it to identify each management level employee over forty years old whose employment with the company had terminated since January 1, 1983. We agree with Hollander's assertion that the district court improperly restricted discovery and thereby prevented him from presenting evidence potentially helpful to his claim of discriminatory discharge. Consequently, we vacate summary judgment on the discriminatory discharge claim.

On the other hand, notwithstanding the district court's erroneous refusal to compel, we find that it did properly grant summary judgment on the retaliation claim. Accordingly, we affirm in part, vacate in part, and remand.

DISCUSSION

A. *Discriminatory Discharge Claim*

Because Hollander is over forty years old, he falls within the class of individuals protected by the Age Discrimination in Employment Act. See 29 U.S.C. § 631(a) (Supp. V 1987). Under the ADEA it is unlawful for an employer to discharge an employee because of that employee's age. See 29 U.S.C. § 623(a)(1). Drawing from the Supreme Court's observation that the substantive prohibitions under the ADEA mirror those under Title VII of the Civil Rights Act of 1964, see *Lorillard v. Pons*, 434 U.S. 575, 584 & n.12, 98 S.Ct. 866, 872 & n.12, 55 L.Ed 2d 40 (1978), we have held that the evidentiary framework measuring discrimination under ADEA borrows from Title VII case law. *See e.g., Lowe v. Commack Union Free School Dist.*, 886 F.2d 1364, 1369 (2d Cir. 1989); *Montana v. First Federal Savings & Loan Ass'n*, 869 F.2d 100, 103 (2d Cir. 1989); *Pena v. Brattleboro Retreat*, 702 F.2d 322, 323-24 (2d Cir. 1983); *Geller v. Markham*, 635 F.2d 1027, 1032 (2d Cir. 1980), *cert. denied*, 451 U.S. 945, 101 S.Ct. 2028, 68 L.Ed 2d 332 (1981). In considering a disparate treatment claim, as presented in this case, we thus follow the three-step burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed 2d 668 (1973, and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed 2d 207 (1981). Under *McDonnell Douglas* and *Burdine*, the plaintiff must first establish a prima facie case of discrimination. The burden then shifts to the employer to counter the prima facie case by advancing a legitimate non-discriminatory reason for its actions. The plaintiff in turn may attack the employer's explanation by showing evidence that the purported non-discriminatory reason was not true and in fact was a pretext for discrimination. *see Burdine*, 450 U.S. at 252-53, 101 S.Ct. at

2033-34: *McDonnell Douglas,* 411 U.S. at 802-04, 93 S.Ct. at 1824-25.

In an ADEA action, the plaintiff establishes a prima facie case by showing (1) he was within the protected age group; (2) he was qualified for the job; (3) he was discharged, and (4) the discharged occurred under circumstances giving rise to an inference of age discrimination. *See Pena,* 702 F.2d at 324. The district court correctly found that, for purposes of ruling on the motion for summary judgment, Hollander had established his prima facie case. Hollander was fifty-seven years old when discharged, was qualified to perform the job of Manager Medical Devices, and his duties were allegedly assigned to two employees, one of whom was eleven years, and the other one year, younger than him. Likewise, the district court correctly found that American Cyanamid's burden of producing a legitimate, non-discriminatory explanation for the discharge was satisfied by its contention that Hollander's interpersonal difficulties necessitated his discharge.

The sticking point in this case comes when we reach the pretext stage of the disparate treatment analysis. In granting summary judgment to American Cyanamid, the district court found that Hollander had failed to advance beyond conclusory assertions in depicting American Cyanamid's explanation for his discharge as pretextual. Hollander has identified several items which he claims raise sufficient uncertainty regarding the reasons underlying his discharge to preclude summary judgment at this stage. First, Hollander notes that although he consistently received over a ten-year period middling to subpar evaluations of his interpersonal skills, American Cyanamid continued to characterize his job performance favorably and award him a steady stream of salary increases, bonuses, and stock options. Only in late 1983, after Hollander had been with the company for ten

consecutive years, he argues, did his employer perceive Hollander's alleged interpersonal deficiencies as a serious problem necessitating his dismissal. second, according to Hollander, American Cyanamid's claim that Hollander's abrasive personality rendered him a liability is somewhat weakened by the inability of Robert Duckett, Hollander's supervisor at the time of his discharge, to testify during his deposition to a single instance in which Hollander's interpersonal difficulties compromised his job performance.

[1] During discovery Hollander posed the following interrogatory to American Cyanamid: "Identify each management level employee who has terminated employment with you since January 1, 1983 and who at the time of the termination of his employment was over the age of 40, stating as to each the reason or reasons for the termination of employment." American Cyanamid objected to the interrogatory on grounds that the term "management employee" was vague and that the request was overbroad, seeking information pertaining to management employees throughout the company, and not merely those working in the Davis & Geck facility which had employed Hollander. Following the magistrate's brief ruling refusing to compel, Hollander objected. The district court in a similar brief ruling upheld the magistrate's refusal to compel discovery, holding the magistrate's implicit finding that further discovery would be burdensome and irrelevant was not clearly erroneous.

We express no opinion as to whether the record, as evaluated by the district court, justifies its granting of summary judgment to American Cyanamid on Hollander's discriminatory discharge claim. Instead, we hold the district court's denial of Hollander's motion to compel an abuse of discretion. As this restriction upon Hollander's discovery unduly limited his ability to establish his argument that American Cyanamid's discharge of him was pretextual, we

vacate summary judgment on the discriminatory discharge claim.

Because management of discovery lies within the discretion of the district court, an appellate court ordinarily will not disturb a district court's ruling on a discovery request absent an abuse of discretion. *See, e.g., Soobzokov v. CBS, Inc.,* 642 F.2d 28, 30 (2d Cir. 1981); *Robertson v. National Basketball Ass'n,* 622 F.2d 34, 35-36 (2d Cir. 1980); *Lehigh Valley Indus. v. Birenbaum,* 527 F.2d 87, 93 (2d Cir. 1975). Notwithstanding this substantial threshold, we find the district court erred in refusing to compel American Cyanamid to answer Hollander's interrogatory. Hollander's discovery request sought information regarding the termination of similarly situated persons, management personnel over forty years old, working for American Cyanamid. Although the request goes beyond the narrow confines of the Davis & Geck Danbury facility in which Hollander worked and pursues facts pertaining to American Cyanamid's employment practices more generally, it is relevant to Hollander's case.

It is well-settled that an individual disparate treatment plaintiff may use statistical evidence regarding an employer's general practices at the pretext stage to help rebut the employer's purported non-discriminatory explanation. *See, e.g., McDonnell Douglas,* 411 U.S. at 804-05, 93 S.Ct. at 1825-26; *Lieberman v. Gant,* 630 F.2d 60, 68-69 (2d Cir. 1980); *Logan v. St. Luke's-Roosevelt Hosp. Center,* 636 F.Supp. 226, 234 (S.D.N.Y.), *aff'd,* 805 F.2d 391 (2d Cir. 1986). Evidence relating to company-wide practices may reveal patterns of discrimination against a group of employees, increasing the likelihood that an employer's offered explanation for an employment decision regarding a particular individual masks a discriminatory motive. This case turns on the sincerity of American Cyanamid's claim

that Hollander's abrasive personality justified his discharge, notwithstanding what Hollander depicts as American Cyanamid's prior fickle attitude towards this dimension of Hollander's job performance and the inability of a company supervisor to detail instances in which such problems impeded productivity. It is possible that Hollander's discovery request might uncover a pattern of older management employees leaving American Cyanamid under unexplained circumstances, which might help prove his claim that American Cyanamid's explanation for his discharge was pretextual.

Because employers rare;y ;leave a paper trail -- or "smoking gun -- attesting to a discriminatory intent, *see Ramseur v. Chase Manhattan Bank.* 865 F.2d 460, 464-65 (2d Cir. 1989) (citing cases); *Dister v. Continental Group, Inc.,* 859 F.2d 1108, 1112 (2d Cir. 1988), disparate treatment plaintiffs often must build their cases from pieces of circumstantial evidence which cumulatively undercut the credibility of the various explanations offered by the employer. Such determinations are, generally speaking, most competently made by the trier of fact. So long as the plaintiff can present "solid circumstantial evidence" supporting his case, *see Clements v. County of Nassau,* 835 F.2d 1000, 1005 (2d Cir. 1987), he should have the opportunity to prove his case at trial. The district court's refusal to compel an answer from American Cyanamid deprived Hollander of evidence potentially helpful to his attempt to assemble such a quantum of circumstantial evidence supporting his argument of pretext. Accordingly, we reverse the district court's denial of Hollander's motion to compel and vacate summary judgment on the discrimination discharge claim. *See Cedillo v. International Ass'n. of Bridge & Structural Iron Workers, Local Union No. 1,* 603 F.2d 7, 12 (7th Cir. 1979) (holding summary judgment inappropriate in disparate treatment case

when a district court limited plaintiff's ability to discover information relevant to employer's motivation) : *see also Diaz v. American Telephone & Telegraph,* 752 F.2d 1356, 1362-63 (9th Cir. 1985) (holding summary judgment "patently inappropriate" when district court restricts plaintiff's ability to discover evidence necessary to establish disparate treatment prima facie case). at the same time, we note that if following the completion of discovery, the district court finds that Hollander has not established a genuine issue of material fact suggesting that American Cyanamid;s discharge of Hollander was pretextual, it may enter summary judgment for American Cyanamid.

B. *Retaliation Claim*

[2] Hollander also challenges the district court's granting of summary judgment for American Cyanamid on his retaliation claim. To establish that an employer has unlawfully retaliated for an employee's having pursued a discrimination action, the employee must show that he was engaged in a protected activity; that there occurred an employment action adverse to the employee; and that there existed a causal connection between the protected activity and the adverse employment action. *see, e.g. Manoharan v. Columbia Univ. College of Physician & Surgeons,* 842 F.2d 111, 1115 (2d Cir.), *cert. denied,* 484 U.S. 965, 108 S.Ct. 455, 98 L.Ed.2d 395 (1987); *Davis v. State Univ. of New York,* 802 F.2d 638, 642 (2d Cir. 1986).

Hollander's contention that American Cyanamid retaliated against him by blocking his attempt in October 1984 to gain employment with Ethicon satisfies the first three elements necessary to show retaliation. First he had instituted an agency complaint in July 1984 charging American Cyanamid with age discrimination. Second,

American Cyanamid knew of his complaint. Third, several months later, in October 1984 Hollander applied for and was denied a position with Ethicon. Around the period in which Hollander's application was pending, American Cyanamid both communicated with Ethicon regarding Hollander and wrote Hollander a letter warning him, first, that his attempt to secure employment with Ethicon violated his non-competition covenant with American Cyanamid and, second, that his offer during the meeting with Ethicon to show a film of scientific processes violated American Cyanamid's proprietary interests in the processes.

[3] Nonetheless, Hollander has not offered any evidence which would fulfill the final requirement of a causal nexus between his filing of the agency complaint, on the one hand, and American Cyanamid's October 26 letter and Ethicon's refusal to hire him, on the other. Hollander contends that the American Cyanamid official who wrote the October 26 letter, Gil Seal, exaggerated the limits Hollander's non-competition covenant placed upon his ability to undertake employment after leaving American Cyanamid. Even if true, this allegation proves only that Seal was incorrect in stating that Hollander could not work for Ethicon. More importantly, neither this allegation, nor any other evidence in the record, tends to show that a retaliatory motive explains American Cyanamid's October 26 letter. Likewise, Ethicon did not attribute its hiring decision to any action undertaken by American Cyanamid.

Because of the lack of evidence demonstrating a causal nexus between Hollander's age discrimination complaint and any subsequent action taken toward him by American Cyanamid, we hold that the district court properly granted summary judgment on the retaliation claim. Our ruling requiring the district court to allow Hollander additional discovery on remand does not alter this aspect of our

opinion. The discovery materials Hollander will be allowed to pursue pertain solely to the termination of older American Cyanamid management employees and are not relevant to Hollander's retaliation claim. *Cf. Davis,* 802 F.2d at 642 ("A finding of unlawful retaliation is not dependent on the merits of the underlying discrimination complaint."

In sum, we find that the district court's denial of Hollander's motion to compel discovery regarding the termination of management personnel an abuse of discretion and vacate the district court's grant of summary judgment to American Cyanamid upon Hollander's claim of discriminatory discharge. We affirm the district court's summary judgment grant on Hollander's retaliation claim. We also note that the district court's dismissal of Hollander's state law claim for tortious interference with a business expectancy rested on the premise that the lack of any remaining federal causes of action in the case rendered jurisdiction over the state law claim improper. Because we reinstate Hollander's challenge to his termination under the ADEA, the district court now has the jurisdiction over the pendant state law claim.

Judgment is in accordance with the opinion.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Arthur Hollander, :
Plaintiff, : Civ. No. B 85-481 (WWE)
v. : [999 F.Supp. 252 (D.Conn
American Cyanamid Company, : 1998].
Defendant. :

RULING ON PENDING MOTIONS

Plaintiff, Arthur Hollander, brought this action against his former employer, defendant American Cyanamid Company ("Cyanamid") ... asserting claims of age discrimination in violation of the Age Discrimination in Employment Act ("ADEA") , 29 U.S.C. § 621 et. seq., retaliation and tortious interference with a business expectancy. On March 23, 1989, this court granted summary judgment in favor of the defendant as to plaintiff's claim for age discrimination and retaliation. On appeal, the Second Circuit vacated that ruling in part, on the narrow finding that this court erred in not permitting plaintiff to discover information regarding management-level Cyanamid employees who were over the age of 40 when their employment with Cyanamid terminated. The appellate court affirmed this court's conclusion as to plaintiff's retaliation claim, and did not preclude a later finding of summary judgment for defendant once the additional discovery has been completed. Hollander v. American Cyanamid, 895 F.2d 80 (2d Cir. 1990).

Discovery now being complete, defendant again moves this court for summary judgment as to plaintiff's remaining claims.[1] Defendant also (sic) court to strike certain portions of the Affidavit of Arthur Hollander, which was submitted in support of plaintiff's Memorandum in Opposition to Defendant's Motion For Summary Judgment.

For the reasons set forth below, defendant's Motion to Strike will be granted in part and denied in part. Defendant's Motion For Summary Judgment will be granted as to plaintiff's ADEA claim, and plaintiff's pendant claim for tortious interference with a business expectancy will be dismissed.

I. BACKGROUND

Plaintiff began his employment with Cyanamid in 1956, but left the company in 1960 to pursue other employment. In 1973, at the age of 47, plaintiff returned to Cyanamid, and was appointed Manager of Management Engineering for Cyanamid's Lederle facility in Pearl River, New York, Upon his re-employment with defendant, plaintiff entered into an Employment Agreement which prohibited him from removing or disclosing Cyanamid's confidential material without

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[1] Discovery in this case has been copious. For instance after the Second Circuit ruling in this case, plaintiff was permitted to serve defendant with several additional interrogatories and requests for production. In addition, after defendants filed the instant motion for summary judgment, plaintiff was permitted to conduct additional company-wide discovery, not limited to terminated employees.

Cyanamid's consent.

Cyanamid appears to have been satisfied and even impressed with plaintiff's intellectual and creative abilities as Manager of Management Engineering. From 1973-1980 plaintiff regularly received salary increases, bonuses and stock options. In addition, Cyanamid's yearly progress review of plaintiff almost consistently gave him an overall rating of "excels in several major areas." Cyanamid often lauded plaintiff for his superior creativity, and noted as much in his performance reviews and in letters to plaintiff.

Starting as early as 1974, however, defendant began to chronicle certain alleged weaknesses in plaintiff's interpersonal skills. For instance, in a progress review dated November 15, 1974 Cyanamid noted that plaintiff had created some antagonism by "shooting from the hip." In plaintiff's October 26, 1976 progress review, Cyanamid stated that "improvement is needed in establishing a higher confidence with middle management and communicating on a level which they understand."

Plaintiff's November 1, 1977 review rated him as "needs improvement" in the category of communications. In that review Cyanamid also noted that plaintiff needed to be "less antagonistic." On November 30, 1978 defendant again rated plaintiff as "needs improvement" in communication and human relations. His reviews further noted that plaintiff still needed to improve "on following communication lines." That review also commented that [t]he tendency to go over anyone who does not immediately respond must be changed."

In 1980 Cyanamid's perception of plaintiff's

interpersonal skills seemed to temporarily improve. In plaintiff's January 9, 1980 review Cyanamid rated plaintiff as "consistently acceptable" in the categories of communications and human relations. Then, in 1981 Cyanamid transferred plaintiff to its Davis & Geck facility in Danbury, Connecticut, and appointed him Manager of Medical Devices.

On October 28, 1981 Cyanamid reverted to rating plaintiff as "needs improvement" in the category of human relations. In October 1982 Cyanamid again rated plaintiff as "needs improvement" in communications and human relations. That review also noted that plaintiff needed to "overcome human relations problems," "improve written and verbal communications" and limit his communication to "normal channels."

Finally, in October, 1983 plaintiff received a particularly scathing review. Plaintiff's supervisor, Robert Duckett, rated plaintiff as "needs improvement" in the areas of communication, human relations, personnel development, leadership and organizing/staffing.[2] Moreover, Duckett commented:

> His major problem is a total lack of comprehension of the vital necessity of properly considering all of the appropriate functional groups which must be involved for successful completion and execution of complex projects. He leaves a "trail of wreckage" of interpersonal and interdepartmental relationships which eventually

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[2] Even in this review, plaintiff received a rating of "superior" for his creativity.

> inhibit the success of projects. He seems to ignore the vital people function almost completely, and doesn't comprehend this effect. He operates like a "one man gang" which is not acceptable in a complex, multi-functional team oriented business.

In January 30, 1984 Cyanamid terminated plaintiff, giving him six months severance pay. Plaintiff was 57 years old. There is some dispute between the parties as to who replaced plaintiff at Cyanamid. Defendant claims that it replaced Hollander with Richard Augsbach, who is only eight months younger than plaintiff. Plaintiff claims that Augsbach was only a temporary "floating" replacement, and that Cyanamid actually replaced him with Felix Esposito, whom Cyanamid appointed as Manager, Device Manufacturing one year after terminating plaintiff. It is undisputed, however, that Cyanamid did not eliminate plaintiff's job after his termination.

In October, 1984 plaintiff contacted Ethicon, Inc., one of defendant's competitors, seeking employment. Plaintiff offered to show Ethicon a film demonstrating the application of automation to suture manufacturing. The parties dispute whether this film contained proprietary information belonging to Cyanamid. After interviewing plaintiff, Ethicon contacted Robert Duckett, plaintiff's former supervisor at Cyanamid, and reported plaintiff's proffer of the film. On October 22, 1984 Ethicon wrote to plaintiff stating that it would not offer him a position. On October 26, 1984 Cyanamid sent a letter to Hollander stating that his proffer of the film to Ethicon was violative of a non-competiton clause in the Employment

Agreement he had signed in 1973, and that Cyanamid intended to enforce that agreement.

Plaintiff brought this action in August 23, 1985, alleging an array of claims against Cyanamid. As noted, plaintiff's remaining claims are for violation of the ADEA and tortuous interference with a business expectancy. On April 1, 1997, defendant filed the motion for summary judgment which is now before the court.

II ANALYSIS

A. Standards for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be granted when "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In deciding whether there are any factual issues to be tried, the court must resolve all ambiguities and draw all reasonable inferences in favor of the nonmoving party. Donahue v. Windsor Locks Bd. of Fire Commissioners, 834 F.2d 54, 57 (2d Cir. 1987).

A dispute over a material fact exists if the evidence would allow a reasonable jury to return a verdict for the nonmoving party. Anderson v. Liberty Lobby inc., 477 U.S., 242, 248 (1986). The initial burden is thus on the moving party to establish that no relevant facts are in dispute. The burden then shifts to the nonmoving party to go beyond the pleadings and by his own affidavits, or by deposition, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. Celotex v. Catrett, 477 U.S. 317, 323-24 (1986).

There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for the fact-finder to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. Anderson at 249-50.

B. Motion to Strike

Plaintiff has submitted an affidavit in an attempt to establish the existence of a genuine issue for trial. Defendants have moved to strike portions of plaintiff's affidavit as not in compliance with Rule 56(e).

Rule 56(e), partially entitled "Form of Affidavit," requires that "[s]upporting and opposing affidavits shall be made on personal knowledge, [and] shall set forth such facts as would be admissible as evidence .... "

Accordingly, when portions of an affidavit do not comply with Rule 56(e), the trial judge is "free to disregard the inadmissible paragraphs and consider the rest of the affidavit." United States v. Alessi, 599 F.2d 513, 515 (2d Cir. 1979). A court may therefore strike portions of affidavits which are not made upon the affiant's personal knowledge, contains inadmissible hearsay or make generalized and conclusory statements. see e.g., United States v. Private Sanitation Industry Ass'n of Nassau/Suffolk Inc., 44 F.3d 1082, 1084 (2nd Cir. . cert. denied. Ferrants v. United States, 116 S.Ct. 50 (1995) (affidavit not made on personal knowledge will not suffice to create issue of fact precluding summary judgment); H. Sand & Co. v. Airtemp Corp., 934 F.2d 450, 454-55 (2d Cir. 1991) (hearsay testimony that would not be admissible if testified to at trial may not

properly be set forth in the Rule 56(e) affidavit; Weeks v. ARA Services, 869 F.Supp. 194, 196 S.D.N.Y. 1994 generalized and conclusory affidavits are insufficient to withstand defendant's motion for summary judgment. To the extent that a Rule 56(e) affidavit contains inadmissible hearsay which references other evidence that is properly before the court, the court may disregard the hearsay but separately consider the admissible evidence. John Hancock Property & Casualty Insurance Co. v. Universal Reinsurance Co. Ltd., 147 F.R.D. 40, 45 (S.D.N.Y. 1993).

Plaintiff's affidavit flagrantly disregards the requirements of Rule 56(e). This 30 page document is riddled with inadmissible hearsay, conclusory statements and arguments, and information clearly not made on the affiant's personal knowledge. Plaintiff's affidavit more resembles an adversarial memorandum that a bona fide affidavit. Plaintiff, without citing law, has abused Rule 56(e) in an attempt to reiterate his legal and philosophical position. The court has been obliged to devote significant resources and time combing through plaintiff's voluminous affidavit to strike numerous offending portions.

The court will hereby strike the following portions of the "Affidavit of Arthur Hollander" because they contain inadmissible hearsay, generalized conclusory and argumentative statements, and/or information which could not be attributed to plaintiff's personal knowledge: the second sentence of paragraph 3; paragraph 4(a) beginning with "without pressure ..."; paragraph 4(b)(iii beginning with "which Cyanamid would ..."; paragraph 4(b)(iv beginning

with "which belie ... ; paragraph 5 and 9; paragraph 11 beginning with "Cyanamid's working records ... "; paragraph 18; paragraph 19 beginning with "[t]his claim is false ..."; paragraph 20 and 22; paragraph 23 up to "first hand knowledge"; paragraph 24; the first sentence of paragraph 25; the first sentence of paragraph 27; the third sentence of paragraph 28; paragraph 29 through "hiring practices" and beginning again with 'perhaps ... "; the second sentence of paragraph 32; paragraphs 33 34; paragraph 35 beginning with "[a]lthough I ..."; paragraph 36 up to "Cyanamid's defense ... "; the first sentence in paragraph 38; the second sentence in paragraph 39; paragraph 40 through "my response ... " and again beginning "and most importantly ..."; paragraphs 42 &43; the last sentence in paragraph 45; the last sentence in paragraph 46; paragraph 54; the third sentence in paragraph 55; paragraph 56; the first and third sentence in paragraph 59; the last sentence in paragraph 60s; the first and last sentence in paragraph 61; paragraph 62 not including the information in parenthesis; paragraphs 63-65, and 74-80.

The court has not striken all of the portions that defendant requested to be striken. To the extent that the court has striken portions of plaintiff's affidavit which quote or paraphrase other evidence properly before the court, the court will separately consider that evidence.

C. Age Discrimination

1. Legal Standards

Plaintiff claims that Cyanamid violated the ADEA when it terminated his employment. Because plaintiff does not

claim to have direct evidence that defendant discriminated against him because of his age, plaintiff must establish his claim under the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Accordingly, plaintiff must initially establish a prima facie case of age discrimination. Plaintiff must establish his prima facie case by showing that (1) he was within the protected age group; (2) he was qualified for the job; (3) he was discharged' and (4) the discharge occurred under circumstances giving rise to an inference of age discrimination. Hollander, 895 F.2d at 83. The burden of establishing a prima facie case is not an onerous one. Sweeny v. Research Foundation of State University of New York, 711 F.2d 1179, 1184 (2d Cir. 1983).

If plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate, clear and specific non-discriminatory reason for discharging plaintiff. Dister v. Continental group Inc., 859 F.2d 1108, 1115 (2d Cir. 1988). At this juncture, however, defendant need not prove the existence of a non-discriminatory reason for its action. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1991).

If defendant successfully articulates a legitimate, non-discriminatory reason for discharging plaintiff, then plaintiff must establish both that the defendant's articulated reason is false, and that discrimination was the real reason for its action. It is not enough for plaintiff to show that defendant's

decision is pretextual. Plaintiff must also prove by a preponderance of the evidence that defendant's stated reason is a pretext for discrimination. St. Mary's Honor Center v. Hick, 509 U.S. 505, 515-17 (1993).

2. Plaintiff's Prima Facie Case

Cyanamid argues that the court should grant its motion for summary judgment because plaintiff failed to establish a prima facie case. Specifically, Cyanamid asserts that it did not discharge plaintiff under the circumstances giving rise to an inference of age discrimination. In support of its position Cyanamid contends that it replaced plaintiff with Richard Augsbach, who is only eight months younger than plaintiff. Plaintiff alleges, however, that his real replacement was Felix Esposito, who was 11 years his junior and who eventually replaced Augsbach.

This court has held before, and the Second Circuit has agreed, that "for purposes of ruling on the motion for summary judgment, Hollander has established his prima facie case." Hollander, 895 F.2d at 83. This court will therefore not revisit that issue.

3. Defendant's Legitimate, Non-discriminatory Reason

Plaintiff argues that summary judgment should not be entered as to his ADEA claim because defendant has failed to articulate with adequate specificity a legitimate non-discriminatory reason for terminating him. Plaintiff contends that defendant is merely hurling epithets at plaintiff, and cannot cite specific examples of plaintiff's alleged interpersonal problem.

The Second Circuit has already held in this case that "the district court correctly found that American Cyanamid's burden of producing a legitimate, non-discriminatory explanation for the discharge was satisfied by its contention that Hollander's interpersonal difficulties necessitated his discharge," Hollander, supra. at 83.

Defendant has cited several progress reviews of plaintiff which chronicle Cyanamid's perception that plaintiff had interpersonal difficulties. These reviews even allude to a specific interpersonal problem that defendant claims plaintiff displayed, which is the alleged failure to communicate through proper channels.

In addition, Cyanamid claims that plaintiff had poor relationships with certain workers whom he supervised that he almost caused those workers to unionize. Cyanamid also claims that it had to remove plaintiff from a "skin stapler" project because of his alleged poor interpersonal skills. Certainly, at this stage, defendant articulated with adequate specificity a legitimate, non-discriminatory reason for terminating plaintiff.

4. Pretext

At the heart of this case is whether after being allowed to conduct protracted and vast discovery, plaintiff has provided evidence from which a reasonable jury could find in his favor. Such an inquiry is especially delicate because "employers rarely leave a paper trail -- or "smoking gun" -- attesting to discriminatory intent." Accordingly, "disparate treatment plaintiffs often must build their cases with pieces of circumstantial evidence which cumulatively undercut the

credibility of the various explanations offered by the employer." Hollander, 895 F.2d at 85. After a careful review of the evidence plaintiff has proffered, however, the court finds that as a matter of law no reasonable jury could conclude that Cyanamid intentionally discriminated against Hollander because of his age.

a. Plaintiff's Evidence of Pretext

In essence, plaintiff's evidence falls into two categories. First, plaintiff attempts to undercut defendant's articulated non-discriminatory reason for discharging him by adducing evidence which he claims shows that Cyanamid's explanation is unworthy of belief, and therefore, a pretext for discrimination. Plaintiff essentially contends that there is a question of fact as to whether he actually had difficulties with interpersonal relationships, and whether the defendant's critiques of him were part of a plan to discriminate against him because of his age.

In support of his position, plaintiff has compiled affidavits of former co-workers who attest that he was, in fact, quite affable. Additionally, plaintiff presents to the court affidavits which indicate that plaintiff may not have been actually responsible for the alleged "union incident" or for an alleged "safety incident" for which the defendant blamed him. Plaintiff also points to evidence already in the record, such as his overall good track record with Cyanamid which included bonuses, raises, and overall positive reviews.

Plaintiff stresses the fact that Robert Duckett, when asked in his deposition to recount specific events leading to his scathing October, 1983 review of plaintiff, cannot

remember a single occurrence. Plaintiff also complains that a good deal of defendant's defense is based on inadmissible hearsay, name-calling, innuendo and reputation evidence. As plaintiff puts it, "defendant does not contend that plaintiff was terminated because he had a bad reputation." Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 12.

This court agrees with plaintiff that his evidence may in fact raise some doubt as to whether defendant's articulated reason for discharging him is believable. Certainly, in some instances.

> The Factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of a prima facie case, suffice to show intentional discrimination.

St. Mary's Honor Center, 509 U.S. at 511 (emphasis added).

In an important Second Circuit en banc decision the appellate court explained, however, that a "finding of pretext, together with the evidence comprising a prima facie finding, is not always sufficient to sustain the ultimate finding of intentional discrimination." Fisher v. Vassar College, 114 F.3d 1332, 1338 (2d Cir. 1997) (en banc) (emphasis added) (hereinafter "Fisher II"); cert. denied, 118 S.Ct. 851 *1998); affirming Fisher v. Vassar College, 70 F,3d 1420, 1437 (2d Cir. 1995) (hereinafter "Fisher I").

In that case, Fisher asserted claims for Title VII and age discrimination after having been denied tenure by her former employer, Vassar College. Fisher attempted to show that

Vassar's reason for not granting her tenure was actually a pretext for discrimination. Specifically, Fisher adduced evidence which indicated that her scholarship, teaching, service and leadership were actually better than Vassar had claimed. Fisher II at 1334. She buttressed this assertion with, inter alia, previous favorable reviews, some of which contradicted certain of Vassar's reasons for denying her tenure. Fisher I at 1334-36.

Notwithstanding this evidence, the Second Circuit affirmed en banc a Second Circuit panel decision holding that it was clear error for the fact finder to conclude that Vassar had discriminated against Fisher. Fisher II at 1345. The en banc majority opinion noted that:

> discrimination does not lurk behind every inaccurate statement. Individual decision-makers may intentionally dissemble in order to hide a reason that is non-discriminatory but unbecoming or small minded .... In short, the fact that a proffered reason was false does not necessarily mean that the true motive was the illegal one argued by the plaintiff.

Fisher II at 1337-39. Accordingly, plaintiff may prevail only if he shows that Cyanamid's proffered reasons are a pretext for discrimination, "either because the pretext finding itself points to discrimination or because other evidence in the record points in that direction -- or both." Fisher II at 1339.

The court finds under the circumstances of this case that of the many possible reasons for Cyanamid's inconsistencies, illegal discrimination is no more likely a reason that any other. Moreover, as the court will discuss in Section II.C.4.b. infra.

plaintiff cannot point to any other evidence which would support a finding of age discrimination. The court thus finds that although plaintiff's evidence may cast some doubt on defendant's proffered reason, it does not permit the inference that defendant discriminated against plaintiff because of his age.[3] See, Fisher II at 1338.

b. Plaintiff's Statistical Evidence

The second category of plaintiff's evidence is comprised of statistics from which plaintiff argues a reasonable jury could infer that Cyanamid discriminated against him because of his age. Plaintiff first offers statistical evidence which analyzes whether age was a factor in Cyanamid's decision to eliminate the jobs of certain management-level employees. These statistics were compiled by Dr. Marie Gaudard, PhD., who is a professor of statistics at the University of New Hampshire. Professor Gaudard's study concluded that "the

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[3] The court also notes that plaintiff's evidence with regard to the veracity of defendant's proffered reason for his termination is actually less probative than certain evidence proffered by Fisher. For instance, although Hollander points out that his reviews were generally good, he can only point to one review in nearly a decade of employment which rates his interpersonal skills as acceptable. Furthermore, Hollander's affidavit evidence of individuals who did not find him to be difficult to work with are not relevant to the issue of whether his supervisors believed him to have poor interpersonal skills. Hollander can point to no evidence which would permit the inference that those supervisors who gave him poor evaluations regarding his interpersonal skills ever believed that his interpersonal skills were adequate. See, Fisher I at 1234-36.

pattern of job eliminated terminations, while facially age neutral, disproportionately impacted older workers. To a high degree of statistical certainty, age had to be a determining factor in the "job eliminated terminations." Plaintiff's Appendix in Opposition to Defendants Motion for Summary Judgment, Vol. II at 190.

Plaintiff also offers his own independent statistical study of Cyanamid's "job eliminated" category, which he concluded that in 26 instances, the jobs in question were not actually eliminated. Rather, plaintiff asserts, a number of those whom Cyanamid classified as "job eliminated" were actually terminated because of their age and replaced with younger workers.

Plaintiff argues that his statistical evidence is "relevant in establishing the company-wide context for [his] termination defeats the inference that his discharge was a mere error of business judgment, and establishes Cyanamid's practice of falsifying the reasons for large numbers of termination [sic]." Plaintiff's Memorandum in Opposition to defendant's Motion for Summary Judgment at 9.

The theory plaintiff pursues in this case is one validated by the Second Circuit in Fisher I, 70 F.3d at 1442. Statistics may be part of a plaintiff's efforts to establish discrimination under a theory of disparate treatment. Indeed, the appellate court vacated this court's original grant of summary judgment in order to afford plaintiff the opportunity to compile statistical evidence. The Second Circuit stated:

> Evidence relating to a company-wide practices may reveal patterns of discrimination against a group of

> employees, increasing the likelihood that an employer's offered explanation for an employment decision regarding a particular individual masks a discriminatory motive ... It is possible that Hollander's discovery request might uncover a pattern of older management employees leaving American Cyanamid under unexplained circumstances which might help prove his claim that American Cyanamid's explanation for his discharge was pretextual.

Hollander, 895 F.2d at 84.

The appellate court's reasoning in Hollander, however, cannot be construed to mean that a proffer of any statistical evidence, no matter how unreliable, can defeat summary judgment in an age discrimination case. In fact, that same court held in Fisher I that certain statistics are so flawed and unreliable that it is clear error for a fact finder to rely on them to infer discrimination. Fisher I, at 1442-43.

For example, a plaintiff may not gerrymander data in order to achieve his desired results. Id. at 1443. See also, Khan v. Grotnes Metalforming Systems, Inc., 679 F. Supp. 751, 760 (N.D. Ill. 1988). A plaintiff in a disparate treatment case must also take into account non-discriminatory explanations for numerical disparities. See e.g., Doan v. Seagate Technology, Inc., 82 F.3d 974, 979 (10th Cir. 1996). Perhaps of greatest importance to a disparate treatment case, however, is the notion that plaintiff statistics must be sufficient to prove that the particular plaintiff was among the individuals who were not treated neutrally. Zahorik v. Cornell University, 729 F.2d 85, 95 (2d Cir. 1984).

Plaintiff's statistical evidence runs afoul of all of these requirements. Professor Gaudard's study, for instance, deals only with Cyanamid's management-level employees whom Cyanamid categorized as "job eliminated." Yet Cyanamid neither eliminated plaintiff's job nor categorized him as "job eliminated." Since plaintiff is not among the individuals Professor Gaudard included in her study, that study cannot provide the kind of particularized evidence relating to the individual plaintiff which is necessary to show discriminatory treatment. Id. at 95.

The fact that Gaudard confined her study to the category of those Cyanamid employees who were "job eliminated" also prevents those statistics from revealing the type of "company-wide" practices that the Second Circuit contemplated. Hollander at 84. Accordingly, no reasonable jury could conclude from this gerrymandered data that Cyanamid discriminated against plaintiff because of his age, See e.g., Fisher I at 1445-46 (clear error for fact-finder not to have considered university wide statistics in concluding that defendant had discriminated against the plaintiff); Khan, 679 F. Supp. at 760 (any relevant statistics must be based upon the entire workforce).

Moreover, plaintiff's own independent study of the "job eliminated" category falls short of evidence from which a reasonable jury could infer that Cyanamid engaged in a company-wide practice of terminating older employees because of their age.

In conducting his study, plaintiff observed that in 26 instances, job titles identical or similar to those which

Cyanamid claims it eliminated, can still be found in Cyanamid's personnel directory. Plaintiff alleges that those surviving job titles appear to be within the same reporting structure as the supposedly eliminated jobs. Plaintiff also asserts that in roughly half of those 26 instances, significantly younger employees "replaced those who were supposedly "Job eliminated."

Yet plaintiff offers no evidence tending to show that what he deems "replacements" were, in fact, replacements. For instance, plaintiff does not proffer any evidence which would show that the so-called "replacements" actually performed the same functions and have the same responsibilities as the individuals whom Cyanamid allegedly mischaracterized as "job eliminated."

Moreover, plaintiff's study fails to account for the fact that of those 26, roughly half of the so-called "replacements' were aged forty or older. See, e.g., O'Connor v. Consolidated Coin Caterers Corp., 116 S.Ct. 1307, 1310 (1996) (inference of discrimination cannot be drawn from the replacement of one worker with another insignificantly younger). Finally, plaintiff's study does not consider the possibility that even if Cyanamid did not eliminate those 26 jobs, it may have terminated those employees for non-discriminatory reasons. See, Fisher I at 1437-1438.

As plaintiff's survey stands, a jury would be left to speculate whether the 26 individuals were categorized as "job eliminated" because their jobs really were eliminated, because their jobs were not eliminated but they were terminated to non-discriminatory reasons, or because Cyanamid

discriminated against them because of their ages. Because speculation cannot suffice for evidence, the court finds that no reasonable jury could conclude from plaintiff's statistical evidence that Cyanamid discriminated against plaintiff because of his age. See, Doan at 977.

III. CONCLUSION

Plaintiff's Motion to Strike [doc. #333] is GRANTED in part and DENIED in part, as set forth above in section II. B. Defendant's Motion for Summary Judgment [doc. #315] is hereby GRANTED as to plaintiff's age discrimination claim. Because there is no remaining federal claim, plaintiff's pendant state claim for tortious interference with a business expectancy is DISMISSED. See United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966)/

Dated this 9th day of March, 1998 at Bridgeport, Connecticut.

Warren W. Eginton

Senior United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 1998

Argued: December 15, 1998 Decided: March 29, 1999

Docket No. 98-7502

Cited 172 F.3d 192 (2d Cir. 1999)

ARTHUR HOLLANDER

Plaintiff - Appellant,

-- against --

AMERICAN CYANAMID COMPANY,

Defendant - Appellee.

Before:

FEINBERG, CALABRESI AND SOTOMAYOR,

Circuit Judges.

Appeal from (1) judgment of the United States District Court for the District of Connecticut, Warren W. Eginton, J., dismissing plaintiff's federal age discrimination claim and (2) related order striking portions of plaintiff's affidavit submitted in support of memorandum in opposition to defendant's motion for summary judgment. Held, (1) stricken portions of plaintiff's affidavit were not based on plaintiff's personal knowledge; contained inadmissible hearsay, made conclusory statements and were properly

stricken: and (2) plaintiff's evidence was insufficient to create an inference that defendant discriminated against the plaintiff because of his age, so that summary judgment for the defendant was proper.

Affirmed. Judge Calabresi concurs in the opinion of the court, and also files a separate opinion.

MARK F. HEINZE, Hackensack, NJ (Monaghan, Monaghan, Lamb & Marchisio, of Counsel), *for Plaintiff-Appellant.*

ALBERT ZAKARIAN, Hartford, CT (Day, Berry & Howard, Daniel A. Schwartz, Keith S. Marks, of Counsel), *for Defendant-Appellee.*

FEINBERG, Circuit Judge:

Plaintiff Arthur Hollander appeal from the grant of summary judgment in the United States District Court for the District of Connecticut, Warren W. Eginton, J., in favor of defendant American Cyanamid Company. As of this writing, Hollander's case has been in the federal courts for more than 13 years. This is also the second time that this court has heard the matter, having remanded the case more than eight years ago in order to allow Hollander to conduct additional limited discovery. Hollander v. American Cyanamid Company, 895 F.2d 80 (2d Cir. 1990).

Hollander appeals principally from the dismissal of his action asserting a claim for age discrimination in violation of the Age Discrimination in Employment Act (ADEA), 29

U.S.C. § 621 et seq. He also appeals from the partial grant of Cyanamid's motion to strike various portions of his affidavit submitted in support of his memorandum in opposition to Cyanamid's motion for summary judgment. The district court dismissed the suit on the grounds that Hollander's evidence was insufficient to create an inference that Cyanamid discriminated against him because of his age. See Hollander v. American Cyanamid Co,, 999 F.Supp. 245 (D.Conn. 1998). For reasons stated below, we affirm.

1. Background

Hollander began his career with Cyanamid in 1956 as an employee at the company's Wallingford, Connecticut facility. He was 30 years old. He left the company in 1960, and returned in 1973 to assume the position of Manager of Management Engineering at Cyanamid's Lederle facility in Pearl River, New York. At the time of his rehire, he was 47.

As Manager of Management Engineering, Hollander received a yearly progress review from his supervisors that rated his ability in several specific areas. The reviews also included comments that elaborated upon or supplemented the ratings. Hollander's reviews show that Cyanamid was consistently impressed with his creativity and commitment to his job. He also received regular salary increases, bonuses and stock options. However, the progress reviews, which were conducted by four different supervisors over the course of Hollander's re-employment at Cyanamid, also consistently documented the perception that Hollander has an abrasive management style and a

difficult personality (hereinafter referred to collectively as "interpersonal problems"). Hollander's 1974 review noted that he had "created some antagonism by 'shooting from the hip.' " His 1976 review stated that [i]mprovement is needed in establishing a higher confidence with middle management and communicating on a level which they understand." Hollander's 1977 review rated him as "needs improvement," the lowest possible rating, in the category of "communications," and noted that "Hollander needed to be more understanding of ... manager's problems and less antagonistic." In 1978, he was rated as "needs improvement" in both "communication" and "human relations." The review commented that Hollander needed improvement in "following communications lines" and that "[t]he tendency to go over anyone who does not immediately respond must be changed." While Hollander's January 1980 review rated him "consistently acceptable" in the categories of "communication" and "human relations." the perceived problems returned in his December 1980 review, in which he was once again rated as "needs improvement" in those categories.

In 1981, Cyanamid transferred Hollander to its Davis & Geck facility in Danbury, Connecticut, and appointed him Manager Medical Devices. The change of setting, however, did not alter the pattern established in Hollander's earlier reviews. His 1981 review rated him as "needs improvement" in "human relations." In 1982, he received a "needs improvement" rating in "human relations." "safety," and "maturity & judgment." The reviews noted that "several projects are not getting proper attention because

of interpersonal relationship problems."

Hollander received his worst review in 1983, in which supervisor Robert Duckett rated him as "needs improvement" in the areas of "communication," "human relations," "personnel development," "leadership" and "organization/staffing," Duckett elaborated:

[Hollander's] major problem is a total lack of comprehension of the vital necessity of properly considering all of the appropriate functional groups which must be involved for successful completion and execution of complex projects. He leaves a 'trail of wreckage' of interpersonal and interdepartmental relationship which eventually inhibit the success of the projects. He seems to ignore the vital 'people function' almost completely, and doesn't comprehend this effect. He operates like a 'one man gang' which is not acceptable in a complex, multi-functional team oriented business.

In addition, Hollander's overall job performance for that year was rated as "needs improvement." the second-worst possible overall rating.[1]

Cyanamid terminated Hollander in January 1984. At the time, he was 58 years old.[2] He was given six months

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[1] The only worse possible overall rating was "consider for termination.

[2] Hollander claims he was 58 in January 1984. The district court said Hollander was 57 when he was terminated. 999 F.Supp.at 254 We do not regard the difference as significant, and use Hollander's f figure.

severance pay and told that his management profile would be circulated within Cyanamid to determine if a different division was interested in his services. Hollander was discharged permanently in August 1984. Just before that -- in July 1984 -- he filed age discrimination complaints with the Connecticut Commission on Human Rights and Opportunities (CCHRO) and the Equal Opportunity Employment Commission (EEOC).

In October 1984, Hollander sought employment with Ethicon, Inc., a medical device manufacturer and competitor of Cyanamid. Hollander offered to show Ethicon a Cyanamid film demonstrating the application of automation to suture manufacturing, which led Ethicon to contact Cyanamid regarding both Hollander and the film. Cyanamid wrote Hollander, stating that his employment at Ethicon would be inconsistent with a non-competition agreement he had signed in 1973, and that his offer to show Ethicon the film infringed Cyanamid's proprietary rights. Without mentioning the non-competiton agreement or the dispute over the film, Ethicon informed Hollander that it would not be offering him a position.

In August 1985, Hollander filed suit in the United States District Court for the District of Connecticut, claiming that Cyanamid discharged him in violation of the ADEA. He also claimed that Cyanamid's opposition to his employment at Ethicon was retaliation for the initial complaints he had brought before the CCHRO and the EEOC and, as such, was a second violation of the ADEA. Hollander further contended that Cyanamid's alleged retaliation amounted to tortious interference with a business

expectancy under Connecticut law. Finally, he alleged that Cyanamid's practices violated federal and state antitrust laws and state law prohibitions on unfair labor practices. Hollander later dropped the antitrust and unfair labor practice claims.

In March 1989, the district court granted Cyanamid's motion for summary judgment on Hollander's ADEA claims. The court held that Hollander had failed to show a nexus between his age and his discharge, and had failed to link Cyanamid's conduct regarding Ethicon to Hollander's filing of discrimination charges with the CCHRO and the EEOC. Because Hollander's federal claims had been disposed of by summary judgment, the district court also dismissed Hollander's remaining state law tortious interference claim for lack of jurisdiction.

On appeal to this court, the judgment of the district court was vacated in part, affirmed in part and remanded. 895 F.2d 80. The panel affirmed the district court's judgment as to Hollander's retaliation claim, Id. at 85-86. However, the panel also held that the district court had erred when it refused to compel Cyanamid to answer an interrogatory asking it to identify each management-level employee over the age of 40 whose employment with Cyanamid had been terminated since 1983. Id. at 85. The panel accordingly remanded the case, deeming the additional discovery necessary to allow Hollander the opportunity to gather statistical evidence which "might uncover a pattern of older management employees leaving ... Cyanamid under unexplained circumstances, which might help prove his claim that ... Cyanamid's explanation for his discharge was pretextual." Id at 84. The panel noted that "if following

completion of discovery, the district court finds that Hollander has not established a genuine issue of material fact suggesting that ... Cyanamid's discharge of Hollander was pretextual, it may enter summary judgment for ... Cyanamid." Id. at 85.

After remand, Hollander expanded his discovery efforts to include several additional interrogatories and requests for production other than the single interrogatory at issue on the prior appeal. When Cyanamid did not respond to the additional requests, Hollander filed a Motion to Compel and for Sanctions. Recommending denial of the motion in November 1994, Magistrate Judge Thomas P. Smith noted that Hollander had "received discovery of an extent unprecedented in this magistrate's experience of over 15 years," and "well beyond the contemplation of the Second Circuit's decision, which the magistrate has interpreted with great fairness toward [him]." The district court adopted the recommendation.

In April 1997, Cyanamid moved for summary judgment on Hollander's claims and moved to strike, as inconsistent with Fed. R. Civ. P. 56(e), certain portions of the affidavit Hollander had submitted in support of his memorandum in opposition to summary judgment. Cyanamid's motion to strike was granted in part and denied in part; the district court struck numerous portion of Hollander's affidavit that, according to the court, contained "inadmissible hearsay, generalized conclusory and argumentative statements, and/or information which could not be attributed to plaintiff's personal knowledge." 999 F. Supp. at 256. The court did not strike everything Cyanamid had argued was

inappropriate and, insofar as some of the striken portions quoted or paraphrased other evidence that was properly before the court, the court separately considered that evidence. Id. The court granted Cyanamid's motion for the ADEA claim, holding that Hollander's evidence did not create an inference that defendant discriminated against him because of his age. Id at 260-61. Having again dismissed Hollander's federal claim, the court again dismissed his state claim for tortious interference for lack of jurisdiction. Id. at 261. This appeal followed.

II. Discussion

A. Motion to Strike Portions of Hollander's affidavit

Rule 56(e) states that:

[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such fact as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

A court may therefore strike portions of an affidavit that are not based on the affiant's personal knowledge, contain inadmissible hearsay or make generalized and conclusory statements. See, e.g., United States v. Private Sanitation Industry Ass'n of Nassau/Suffolk, Inc., 44 F.3d 1082, 1084 (2d Cir. 1995). Hollander argues that the district court erred in striking portions of his affidavit because the striken provisions were (1) harmless summaries or conclusions incorporated discovery material contained elsewhere in the record, (2) Hollander's first-hand knowledge of his own work, Cyanamid's records and practices, and the alleged

personal knowledge of Cyanamid's witnesses, and (3) Hollander's description of the statistical evidence.

We will not disturb a district court's grant of a motion to strike unless manifestly erroneous. Cf. Luciano v. Olsten Corp., 110 F.3d 210, 217 (2d Cir. 1997). Hollander correctly notes that some of the striken provisions were summaries of evidence properly included elsewhere in the record. That, however, does not lead to the conclusion Hollander desires because, as already noted, that evidence was separately considered by the district court. Hollander 999 F. Supp. at 256. Hollander's remaining contentions are without merit. The district court was correct in holding that the affidavit "flagrantly disregard[ed] the requirements of Rule 56(e)," and was "riddled with inadmissible hearsay, conclusory statements and arguments, and information clearly not made on the affiant's personal knowledge" and "more resemble[d] an adversarial memorandum than a *bona fide* affidavit." Id. The court acted well within its discretion by striking the appropriate portions of the affidavit.

B. Hollander's ADEA Claim

The ADEA forbids employers from discriminating in hiring, discharge, or the setting of "compensation, terms, conditions, or privileges of employment" based upon the age of an employee. 29 U.S.C. §623 (a)(1); see also Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993). The ADEA covers the class of individuals who, like Hollander, are over the age of 40, 29 U.S.C. §631 (a), and the evidentiary framework for proving age discrimination under the statute is the same as that for proving discrimination

under Title VII. See Raskin v. Wyatt Co., 125 F.3d 55, 60 (2d Cir. 1997). Thus, in a disparate treatment case like this one we follow the three-step, burden-shifting analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). Briefly, the analysis is as follows. First, the plaintiff must establish a prima facie case of discrimination. The burden then shifts to the employer to rebut the prima facie case by providing a legitimate, non-discriminatory reason for its actions. The plaintiff then has the opportunity to show that the reason offered by the employer was not its true reason, and that age was. The questions that must be asked is whether the plaintiff has shown by a preponderance of the evidence, that he has been a victim of age discrimination. Thus, the "ultimate burden of persuading the the trier of fact that defendant intentionally discriminated against the plaintiff remains *at all times* with the plaintiff." Burdine, 450 U.S. at 253 (citations omitted) (emphasis supplied).

1. *Hollander's Prima Facie Case*

To establish a prima facie case of discrimination, Hollander had to show that (1) he was within the protected age group, (2) he was qualified for the job, (3) he was discharged, and (4) the discharge occurred under circumstances giving rise to an inference of age discrimination. See Hollander v. American Cyanamid, 895 F.2d at 83. The burden of proof that must be met to establish a prima facie case is minimal. See Chambers v. TRM Copy Ctrs. Corp., 43 F.3d 29, 37 (2d Cir. 1994);

Dister v. Continental Group, Inc. 859 F.2d 1108, 1114 (2d Cir.-1988). This court held in Hollander's first appeal that he had established a prima facie case for purposes of summary judgment: he was 58 years old when discharged, was qualified to perform his job as Manager of Medical Devices, and his duties were allegedly assigned to two replacements, the first of whom (Richard Augsbach) was approximately eight months younger and the second (Felix Esposito) 11 years younger [3] See Hollander, 895 F.2d at 83.

2. Cyanamid's Articulation of a legitimate, Non-Discriminatory Reason

Since Hollander establish a prima facie case, the burden shifted to Cyanamid to articulate an legitimate, non-discriminatory reason for his discharge. Cyanamid points

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[3] Hollander filed his complaints with the CCHRO and the EEOC in July 1984, at which time his former job was being performed by the 57 year old Augsbach. Hollander argues that Augsbach was a temporary "floating" replacement, and that his true replacement was Esposito. Esposito, however, did not even apply for a position at Cyanamid until November 1984, and began working for the company in March 1985. Although the replacement of Hollander with an "insignificantly younger" person like Augsbach would not give rise to an inference of discrimination. see O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312-13 (1996) ("In the age-discrimination context, such an inference [that an employment decision was based on age] cannot be drawn from the replacement of one worker with another worker insignificantly younger."), on a motion for summary judgment, we must construe the facts in the light most favorable to plaintiff.

to the interpersonal problems that were consistently documented in Hollander's personnel reviews. Cyanamid also claims that Hollander had to be removed from a project because of his poor interpersonal skills, and his strained relations with certain employees he supervised caused them to seek union representation.

Hollander's brief attempts to show that Cyanamid failed to put forth a legitimate, non-discriminatory reason for his discharge. Hollander argues that the district court erred in failing to strike as hearsay and violative of the best evidence rule the deposition testimony of various Cyanamid employees, including Davis & Geck Director of Operations Gill Seal, Personnel Director John O'Shaughnessy and Personnel Department employee Robert D'Andrea, which supported Cyanamid's stated reason. This contention, however, does not merit much discussion. First, the district court's opinion after remand did not refer to the challenged statements at all and did not appear to consider or rely on them in concluding that Cyanamid sufficiently articulated a legitimate, non-discriminatory reason for Hollander's discharge. Further, this court held in Hollander's first appeal that Cyanamid had satisfied its burden of producing a non-discriminatory motive for Hollander's termination. See Hollander, 895 F.2d at 83. Finally, even if the district court did err in failing to strike these statements, there was ample other evidence, documented in year after year of progress reviews, from which to conclude that Cyanamid had furnished a legitimate reason with adequate specificity. Accordingly, the district court's error, if any, in refusing to strike the challenged

statements was harmless.

3. Hollander's Attempt to Show that he is a Victim of Age Discrimination.

Cyanamid's articulation of a legitimate, non-discriminatory reason brings us to what the district court called "the heart of this case" -- whether Hollander has presented sufficient evidence for a reasonable jury to conclude that Cyanamid discriminated against him because of age. 999 F. Supp. at 257. Hollander put forth two categories of evidence in support of his position. First, he offered evidence to rebut Cyanamid's non-discriminatory reason by raising a question of fact as to whether he actually had interpersonal problems; in other words, Hollander attempted to show that Cyanamid's stated reason for his discharge was pretextual and itself constituted proof of discrimination. Second, he offered statistical evidence from which, he argued, a reasonable jury could infer that Cyanamid discriminated against him because of his age. While the district court found that the evidence submitted by Hollander "may in fact raise some reasonable doubt as to whether [Cyanamid's] articulated reason for discharging him is believable", 999 F.Supp. at 258, it held that no reasonable jury could conclude that, based on the evidence, Hollander was a victim of discrimination. For the reasons stated below, we agree.

a. Hollander's non-statistical evidence

Various items made up the first category of evidence on which Hollander relies. Hollander offered affidavits from former co-workers stating that he was not difficult to work

with and may not have been responsible for the alleged unionization incident cited by Cyanamid. Hollander also stressed the fact that, at his depositions in 1986 and 1987, Duckett could not remember a single event that led to the scathing 1983 review of Hollander in which Duckett wrote that Hollander left a "trail of wreckage" in regard to interpersonal relationships. In addition, Hollander offered letters from employees at Cyanamid -- including Duckett -- complimenting his efforts as Manager of Medical Devices.

We need not decide whether Hollander offered enough evidence to establish that Cyanamid used his allegedly poor interpersonal skills as a pretext for its true reason for terminating him. Assuming arguendo that he did, this is far from the end of the matter, for to survive summary judgment Hollander had to show not only pretext, but also *either use of a pretext that itself implies a discriminatory stereotype, or use of pretext to hide age discrimination.* This, he did not do.

This court was presented with a similar situation in Fisher v. Vassar College, 114 F.3d 1332 (2d Cir. 1997)(en banc) (*Fisher III)*, cert. denied, 118 S. Ct. 851 (1998). In *Fisher III,* plaintiff, Cynthia Fisher asserted claims of sex and age discrimination after being denied tenure by her former employer, Vassar College. Vassar argued that Fisher was denied tenure because a review that found her scholarship, teaching ability, leadership and service to the college to be deficient. In an attempt to show that Vassar's reason was pretextual, Fisher offered evidence that contradicted certain conclusions of the review. The district court, after a bench trial, concluded in Fisher v. Vassar

College, 852 F.Supp. 1193 (S.D.N.Y. 1994 (Fisher) that Vassar had discriminated against Fisher on the basis of her sex. A panel of this court, however, reversed the district court. Fisher v. Vassar College, 70 F.3d 1420 (2d Cir. 1995) (Fisher II) . Thereafter, the en banc court in Fisher III reached the same result as the panel did in Fisher II because Fisher's evidence did not show that Vassar's stated reason for denial of tenure was a pretext for discrimination on the basis of her sex or itself reflected a discriminatory stenotype. Fisher III, 114 F.3d at 1333. The en banc majority opinion stated that a "plaintiff may prevail only if an employer's proffered reasons are shown to be a pretext for discrimination, either because the pretext finding itself points to discrimination or because other evidence in the record points in that direction -- or both." Id. at 1339: see also, Quaratino v. Tiffany & Co., 71 F.3d 58, 64 (2d Cir. 1995) ("An employer's reason for termination cannot be proven to be a pretext for discrimination unless it is shown to be false *and* that discrimination was the real reason"). While Fisher produced some evidence of pretext, neither the pretext nor the record pointed to the conclusion that Vassar had discriminated against her on the basis of her sex. elaborating, the majority of the en banc court stated in *Fisher III* that

> discrimination does not lurk behind every inaccurate statement. Individual decision-makers may intentionally dissemble in order to hide a reason that is non-discriminatory but unbecoming or small minded, such as back-scratching, log-rolling, horse-trading, institutional policies, envy, nepotism, spite, or

> personal hostility ... In short, the fact that the proffered reason was false does not necessarily mean that the true motive was the illegal one argued by the plaintiff.

114 F. 3d at 1337-38

The district court in this case reached the same conclusion, and we agree with Cyanamid that the court did not commit reversible error in doing so. First, assuming arguendo that Hollander's alleged interpersonal problems were used by Cyanamid as a pretext for the company's true reason for his termination, the pretext in and of itself does not suggest age discrimination. Had Cyanamid claimed that it terminated Hollander because of a characteristic stereotypical associated with age -- for example, because he was "unable to keep up with the times" -- and had Hollander shown that reason to be pretextual, our conclusion might be different.[4] The perception that Hollander had interpersonal problems - noted almost from the outset of his re-employment by

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[4] As noted by the district court, 999 F. Supp. at 253 n.1., despite the "copious", amount of discovery in this case, Hollander's non-statistical evidence attacking the truthfulness of Cyanamid's reason for his termination is weaker than the evidence of pretext offered by Fisher, Id. at 259 n.3. Unlike Fisher, Hollander offered insufficient evidence to permit an inference that the supervisors who poorly rated his interpersonal skill actually believed that they were adequate. Hollander's affidavit evidence shows only the opinions of his co-workers, not those of his supervisors.

Cyanamid -- does not reflect such stereotypical thinking.

Second, nothing else in the record points to age discrimination as the real reason for Hollander's termination. As we noted in Fisher III, an employer may give a false explanation for terminating an employee in order to mask the true reason which, though petty, spiteful or otherwise ignoble, is not unlawful. Hollander overlooks this statement of law by contending that if Cyanamid's proffered reason is not to be believed, then the true reason for his termination must have been his age. However, Hollander put forth no proof of any age-related remarks or actions toward him by Cyanamid personnel, and admitted that his age was never explicitly raised as a factor in his termination. If reliance on Hollander's alleged interpersonal problems was indeed a pretext -- and we repeat that we are not so holding -- the record before us shows that the stated reason may have been a pretext for various non-discriminatory reasons.[5] This is not a case in which a finder of fact could reasonably conclude that Hollander's termination was, more probable than not, due to age discrimination because no other, non- discriminatory

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[5] One example of a possible non-discriminatory reason is the apparent friction between Hollander and Duckett. In one incident, Hollander (unknown to Duckett) sent Duckett;s supervisor a copy of a memorandum Hollander wrote to Duckett disagreeing with Duckett's decision to remove him from a particular project. Duckett was sufficiently displeased by Hollander's action, which he considered "out of line" and "insubordination, " to meet with Hollander and memorialize it in an internal memorandum.

explanation was possible. The district court concluded that "of the many possible reasons for Cyanamid's inconsistencies, illegal discrimination is no more likely a reason than any other." Hollander, 999 F. Supp. at 259. We agree. Therefore, it was not error for the district court to hold that this evidence did not permit the inference that Cyanamid discriminated against Hollander because of his age.

b. *Hollander's statistical evidence.*

We are thus left with the question whether Hollander's statistical evidence was sufficient to prevent the grant of summary judgment. As this court held in several cases, disparate treatment plaintiffs may introduce statistics as circumstantial evidence of discrimination. See, e.g. Stratton v. Dep't for the Aging, 132 F.3d 869, 877 (2d Cir. 1997); Hollander, 895 F.2d at 84. Hollander offered two bodies of such evidence to the district court. The first was a statistical analysis and report prepared by Dr. Marie Gaudard, PhD. (the Gaudard Report), a statistics professor at the University of New Hampshire. Gaudard analyzed the terminations of Cyanamid managerial employees whose jobs were eliminated -- that is, employees who were terminated because their positions at Cyanamid ceased to exist and were theoretically never replaced. Gaudard claimed that, to a high degree of statistical certainty, age was the determining factor in the terminations of this "job eliminated" category of employees. The second body of statistical evidence, which Hollander calls the "title-switching evidence." was Cyanamid's personnel directories

which he claims, justifies an inference of age discrimination,

Hollander argues that the district court usurped the role of the jury by weighing the strength of, and ultimately rejecting, both bodies of evidence. Our reading of the district court's opinion, however, is that the court determined that the evidence was not at all probative of age discrimination against Hollander. A district court's discretion in choosing whether or not to admit evidence is broad, See United States v. Local 1804-1, Int'l. Longshoremen's Assoc., 44 F.3d 1091, 1095 (2d Cir. 1995). Like any other evidence, the opinion of an expert is not immune from the relevance requirement of Rule 401 of the Federal Rules of Evidence. See United States v. Khan, 787 F.2d 28, 34 (2d Cir. 1986). Indeed, a district court must act as a gatekeeper to exclude invalid and unreliable expert testimony. See General Elec. Co. v. Joiner, 118 S.Ct. 512, 517 (1997); Raskin, 125 F.3d at 65-66 (rejecting, in ADEA case, plaintiff's argument that the district court "usurped the role of a jury" when it held inadmissible expert's statistical report of employer's promotion and termination practices). We therefore review the district court's ruling for abuse of discretion. See Joiner, 118 S.Ct. at 517.

(i) *The Gaudard Report*

We begin with the Gaudard Report. First, Gaudard plotted in 10-year grouping, the age distribution of Cyanamid's managers compensated at salary level "9" and higher (level

9+) during the period 1984-1989.[6] The Report suggests that a 5 percent decrease in level 9+ managers age 50-59 during the time is evidence that Cyanamid's terminations did not occur in an age-neutral manner. However, the Report's inference of discrimination solely on the basis of the raw numbers is impermissible in the absence of any attempt to account for other causes of the age 50-59 anomaly. See Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 657 (1989) (requiring a showing of causation between the challenged practice and the alleged disparities); Raskin, 125 F.3d at 67-68. Gaudard made no attempt in this part of the report to examine how many level 9+ managers age 50-59 left Cyanamid voluntarily from 1984-1989, or how many people in that age grouping applied to Cyanamid during that period. High-lighting Gaudard's failure to account for explanations other than discrimination is the fact that both the age 60-69 and 70-79 level 9+ workforce increased moderately over the course of those years.[7] In Short, the data presented by Gaudard in this part of the report does not make it any more or less likely that Cyanamid is liable for age discrimination.

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[6] We are informed that the data provided to Hollander by Cyanamid permitted analysis for the years 1984, 1985, 1987, and 1989 only.

[7] It is also worth noting that, during the 1984-89 period the greatest increase in Cyanamid's level 9+ workforce occurred in the 40-49 age group -- employees within the class of persons covered by the ADEA.

The second part of the Report is also flawed although somewhat more sophisticated. Gaudard analyzed the terminations of Cyanamid managers age 40 and over and compensated at salary level "9" and higher ("level 9+/age 40+ managers") during the periods 1981-1991, 1981-1984 and 1984-1989. Using numerical termination codes that correspond to the reason for each termination, Gaudard excluded from her analysis employees who were voluntarily terminated for reasons such as "resignation," "other employment," and "relocation." She also excluded involuntary terminations for reasons such as "unsatisfactory performance," and "insubordination." Finally, she excluded retirements, deaths and group terminations. From the original group of approximately 1300 level 9+/40+ managers, Gaudard was left with 245 who had been involuntarily terminated because Cyanamid had eliminated their jobs (the "job eliminated" group). Gaudard made this "job eliminated" group the company-wide statistical sample for her analysis. She claimed that the statistical likelihood of observing as many "job eliminated" terminations of managers ages 55-69 as was observed over the three relevant time periods referred to above, "is virtually zero," and conclude[d] with a high degree of statistical certainty that job eliminated was not an age-neutral termination reason."

However, the conclusion of the Report that underlies Hollander's argument here depends on a misleading age grouping that impermissibly skews the data in Hollander's favor, see Fisher II, 70 F.3d at 1443 (a plaintiff may not gerrymander data in order to achieve a desired result). In

contrast to the 10 year age groupings in the rest of the Report, Gaudard's "job eliminated" analysis uses the 15-year grouping of ages 55-69 to show Cyanamid's allegedly discriminatory termination pattern. This grouping, of course, encompasses Hollander's age at the time he was fired -- 58. a close examination of the data, however, shows that it was managers age 60-69 who had their jobs eliminated at a much higher rate than all other managers, including those age 55-59. In other words, it is the job eliminations in the 60-69 segment of the 55-69 age grouping that accounts for the disparity between job eliminations for manager age 40-55 and those age 55-69. Thus, we believe that the district court did not err in concluding that the Gaudard Report was not sufficiently probative of age discrimination against Hollander to survive summary judgment.

ii. *The Title-Switching Evidence*

The second body of statistical evidence offered by Hollander was his own study of Cyanamid's personnel directories, the "title-switching" evidence. According to Hollander, the directories show that 26 positions out of the 245 that Cyanamid coded as "job eliminated" still exist. He claims that approximately half of those 26 positions were filled by employees significantly younger than those who were purportedly "job eliminated." He thus concludes that a number of managers whose terminations were coded as "job eliminated" were actually terminated because of their age and replaced by younger employees.

We agree with the district court that unreliability

problems are also present in the title-switching evidence. The district court correctly pointed out that Hollander offered no evidence showing the so-called younger replacements actually performed the same duties as the terminated managers whom Cyanamid allegedly mischaracterized as "job eliminated." 999 F.Supp. at 260. By failing to place the text of the directories, which continue to list job titles similar or identical to some of those Cyanamid claims were eliminated, within any sort of factual context, Hollander is unable to show that the younger employees in those positions are truly replacements. The district court also pointed out that "plaintiff's study fails to account for the fact that of those 26 [so-called replacements], roughly half ... were aged 40 or older." Id. Finally, the district court noted that the evidence does not consider the possibility that even if Cyanamid mischaracterized the 26 positions as "job eliminated," it terminated the employees who performed those jobs for non-discriminatory reasons. Id.

Accordingly, we hold that the district court acted within its discretion in holding the statistical evidence inadmissible because no reasonable could infer from it that Cyanamid discriminated against Hollander because of his age.

Conclusion

We have considered all of Hollander's arguments, and find that they do not justify reversal. We conclude that (1) the district court did not err in striking portions of Hollander's affidavit because they were not based on

plaintiff's personal knowledge, contained inadmissible hearsay and made conclusory statements; and (2) Hollander's evidence was insufficient to create an inference that defendant discriminated against him because of his age. The judgment of the district court is, therefore, affirmed.

CALABRESI, Circuit Judge, concurring:

I join the panel's opinion in full. I write separately only to note that, in appropriate circumstances, evidence of discrimination against one group of people can support an inference of discrimination against another group. For example, if statistical or other evidence indicated that an employer discriminated against Asian-Americans, Asians, Chicanos, and African-Americans, it might be reasonable to deem that evidence relevant to a claim that the same employer had discriminated against a Native American or a Nigerian. This would especially be so if the available data were insufficient to establish a pattern of behavior toward plaintiff's class specifically, as might be the case if plaintiff had been the only Native American or Nigerian in the defendant's employ. Because nothing in the panel's opinion precludes the use of statistical evidence in such a case, I concur.

EXPERT OPINION *

Analysis of "Job Eliminated" Terminations in the Context of Demographic Data

by Marie Gaudard, PhD.
Professor of Statistics
University of New Hampshire

Summary.

This report analyzes whether age played a statistically significant role in the termination of American Cyanamid managers of level 9 and higher (level 9+) and age 40 through 69 (age 40+), not withstanding the age-neutral description for their termination as "job eliminated." A previous report was based on termination data alone, since demographic data on the age distribution of the level 9+ workforce had not been provided by Cyanamid. The report at hand utilizes demographic information that Cyanamid produced and delivered to the plaintiff on August 15, 1997, pursuant to a court order.

The demographic data which Cyanamid was required to produce included electronic and hard copy versions of spreadsheets containing name, division, age, grade level, and

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* Because of the significance of this report in support of proof of a company-wide pattern & practice of discrimination, See, Hollander v. American Cyanamid 895 F.2d 80, 84 (2d Cir. 1990) (at Appendix 9a-10a) - and in accordance with S.C.R.14 (.1) (v) "Contents for Petition", plaintiff submits this report for the court's review

title for level 9+ employees for the six years 1984 - 1989, inclusive. Due to data-handling errors (see "Data Description" below), the data actually provided by Cyanamid only permitted analysis for the years 1984, 1985, 1987, and 1989.

Descriptive analysis of the demographic data indicated that the age 50-59 managerial force experienced a substantially larger decrease in percentage over the 1984-1989 period than would be expected in the natural aging of the workforce. Using the demographic data for the age 40-69 portion of the level 9+ workforce, we demonstrate statistically that the percentage of older employees whose jobs were "eliminated" is so large that it is extremely unlikely to have occurred by chance alone, indicating that the reason "job eliminated" was not age neutral. We also demonstrate that the mean termination age for terminations occurring between 1984-1989 is highly inconsistent with the hypothesis that these terminations occurred at random, again leading us to conclude, to a high degree of statistical confidence, that the reason "job eliminated" was not age neutral.

The demographic data completely supports our original conclusion that the pattern of "job eliminated" terminations, while facially age-neutral, disproportionately impacted older workers. To an extremely high degree of statistical certainty, age had to be a determining factor in the "job eliminated" terminations.

Data Description

The electronic versions of the demographic data produced by Cyanamid contained complete files for only the years 1985, 1987, and 1989, the data for the other years was

partial and not accessible through the file structure on the discs. A computer specialist was able to reconstruct the 1984 data by locating the partial file on the disk, scanning the missing information from the hardcopy, and hand-checking the results. It was not practical to reconstruct the data for the years 1986 and 1988 in the ten-day period allotted for analysis, since these were larger files and the scanning/checking process would have been too time-consuming. However, the data for the four years 1984, 1985, 1987, and 1989 gives a sufficient view of the demographic trends over the 1984-1989 period to result in a sound statistical analysis

The files and hardcopy provided contained large numbers of records which listed duplicate names and birthdays for a given employment year, as well as individuals with unknown birth dates. The duplicate records in a given year, and the records for individuals with unknown birth dates, were deleted prior to conducting the analyses below.

Ages were calculated by computing the number of years between an individual's birthday and 12/31 in the given employment year; the computations were done on a continuous scale with a leap year adjustment (for example, a person born on 6/15/34 would have age 50.5462 in 1984). For all analyses except the "Statistical Analysis of Ages at Termination", these ages were truncated to reflect what one usually means by age (for example, an individual who was 50.5462 in 1984 was treated as if he or she was 50 in 1984). since the methodology used in the section "Statistical Analysis of Ages at termination" usually assumes continuous data, the untruncated ages were used in this analysis. The termination ages computed in our first report were treated in a similar fashion, so that both sets of age data were treated consistently.

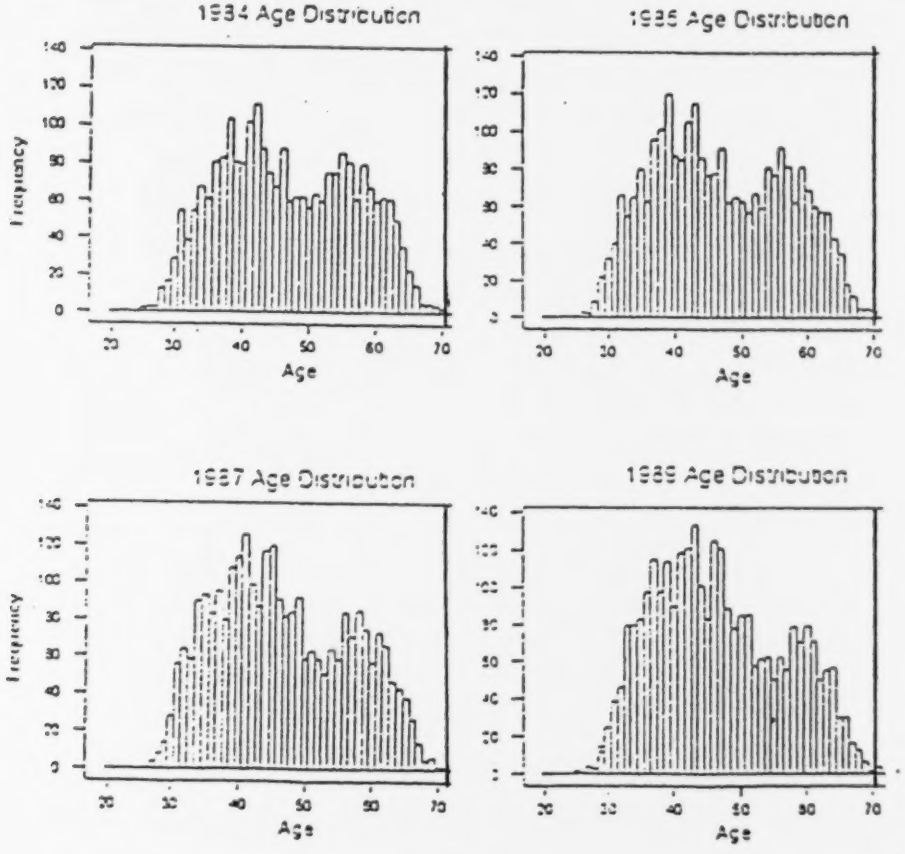
Descriptive Analysis of Demographic Data

The numbers and percentages of level 9+ employees falling in ten-year age grouping are give in the table below. It is notable that the overall workforce increased by 435 workers over the six-year period, but that this increase was seen primarily in the under fifty population. The 50-59 age grouping experienced a 5% decrease in size over this period. Although the percentage of managers in the 60-69 age grouping remained relatively constant while its size increased moderately, it may be that the size of this portion of the managerial force was reduced prior to the 1984-1989 period. The increase in the number of the 60-69 year old manager may result from a larger pool of managers moving into the 60-69 age grouping with time. Unfortunately, we would need more historical data to determine whether the observed percentages and numbers in the 60-69 age group category are anomalous.

Numbers and Percentage of Level 9+ Employees in Ten-year Age Groups

	20-29	30-39	40-49	50-59	60-69	70-79	All
1894	51	686	781	706	295	2	2521
	2.0%	27.2%	31.0%	28.0%	11.7%	0.1%	100%
1985	52	746	838	724	331	4	2695
	1.9%	27.7%	31.1%	26.9%	12.3%	0.2%	100%
1987	38	797	991	671	345	3	2845
	1.3%	28.0%	34.8%	23.6%	12.1%	0.1%	100%
1989	32	813	1051	680	373	7	2956
	1.1%	27.5%	35.6%	23.0%	12.6%	0.2%	100%
Avg %	1.6%	27.6%	33.1%	25.4%	12.2%	0.1%	100 %

The following graphs portray the distribution of ages for the level 9+ workforce for each of the years for which the analysis was possible. One would expect that natural aging of the workforce would result in the age distribution moving to the right over time. Thus one would expect the 1989 curve to look like the 1984 curve, simply shifting 5 units to the right. What we see instead is that the shape of the distribution changes from one with nearly two equal humps in 1984, indicating slightly more "younger" (under 50) employees than "older" (50 and over) employees, to one in 1989 where the disparity between "younger" and "older" employees is quite obvious, with the percentage of "older" employees having decreased markedly.



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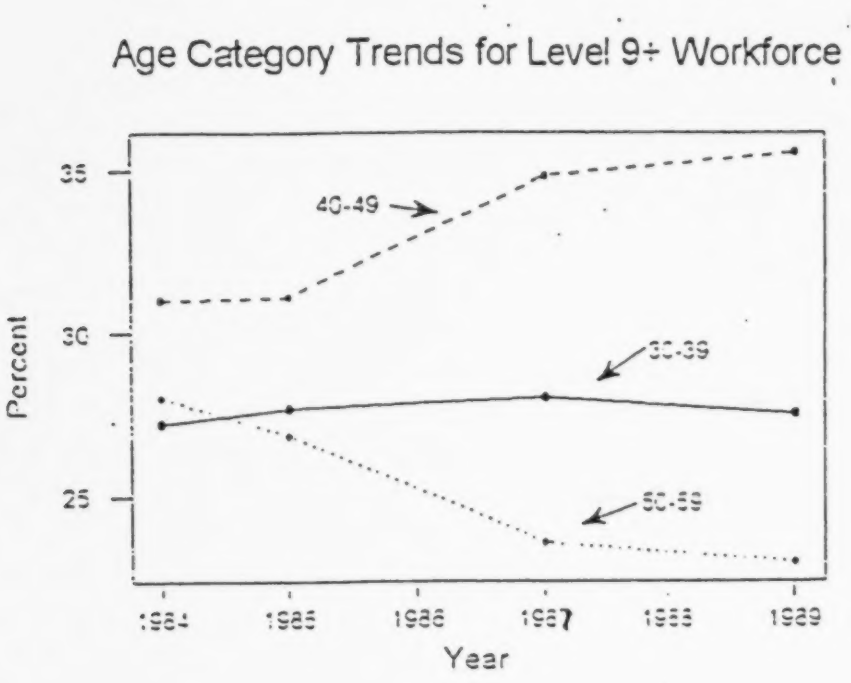
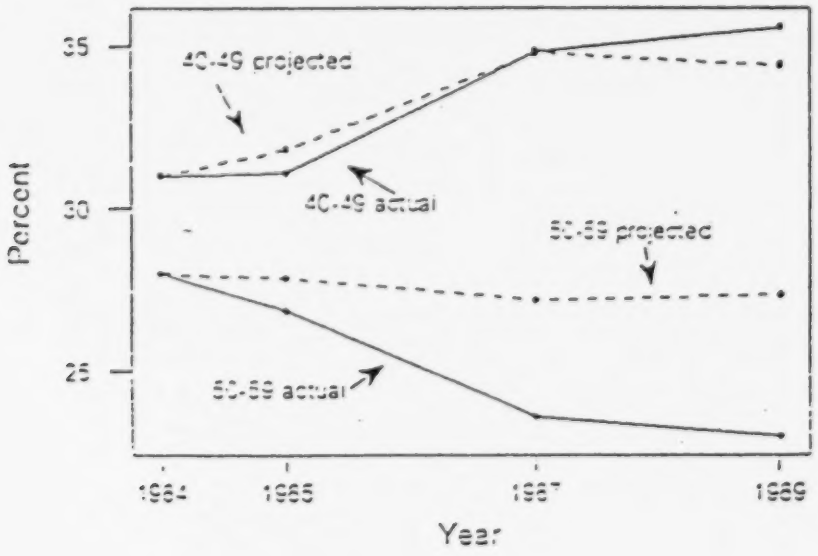
The graph below plots the percentage of the level 9+ workforce in each of the three major age categories, namely 30-39, 40-49, and 50-59, over the four years for which data could be analyzed. The percentage in the 40-49 age group increases from 31.0% in 1984 to 35.6% in 1989, while the percentage in the 50-59 age group decreases from 28.0% in 1984 to 23.0% in 1989. A nearly 5% increase in the 40-49 age group is mirrored by a 5% decrease in the 50-59 age group.



Workforce aging is addressed in the graph below, where we plot the actual percentages of level 9+ employees in the 40-49 and 50-59 age groups for the past four years in question along with the percentages of managers who would have achieved these age groups had no change in the composition of the workforce occurred between 1984-1989. Note that the projected percentages for the 50-59 age group remain essentially constant while the actual percentages decrease markedly. In fact, the observed percentages in 1989 was 23.0%, while the projected percentage assuming no change in the age composition of the workforce is 27.3%, a full 4.3% higher. In contrast, the actual and projected figures for the age 40-49 percentages show very little discrepancy.

Actual Percentages and Projections Based on 1984 Demographics



These two graphs taken together suggest that, over the period studied, the percentage of older managers, as represented by the 50-59 age grouping, decreased to a much greater degree than would be expected had normal aging of the workforce occurred. (Note that we do not address the 60-69 age grouping in terms of projections, since retirement and other age-based reasons are likely to impact projections for this group based on a data from a single year. Additional historical data would be required to determine whether this group decreased beyond what would be expected under normal workforce aging). Assuming that terminations of managers under 60 occurred in an age-neutral fashion, all age categories of managers under 60 would have been equally affected.

The data strongly suggest, in descriptive terms, that terminations did not occur in an age-neutral fashion. As explained in our earlier report, descriptive methods give *insight* into data but sound *conclusions* must take into account statistical *variation*. For this reason, we will base our conclusions on generally accepted statistical methodology. The following sections address the issue of whether what has been observed in our descriptive analysis is likely to have occurred by chance, or whether *age-related* factors played a role. (emphasis added).

Statistical Analysis of Termination Data and Demographic Data

The original report analyzed the ages of level 9 and higher (level 9+) employees, aged 40 through 69 (age 40+), whose jobs American Cyanamid claims to have eliminated. This data was studied over two ranges of dates 1981-1984 and 1981-1991. The 1981-1984 range of dates was chosen to

yield a sufficiently large data sample that reflected the termination activity at American Cyanamid in the three years preceding Mr. Hollander's termination in 1984, as well as in his termination year. The 1981-1991 range of dates was chosen to reflect the period preceding Mr. Hollander's termination and through a typical retirement age of 65. (Mr. Hollander would have been 65 in 1991).

We now have partial demographic data for the population from which the terminations occurred, and we can determine statistically whether the observed numbers of terminations and the ages at termination were in fact reasonable in the light of the age distribution of the population. Our demographic data covers the years 1984, 1985, 1987, and 1989, and covers all level 9+ managers. The data originally released by Cyanamid only covered age 40-69 level 9+ managers who had been terminated.

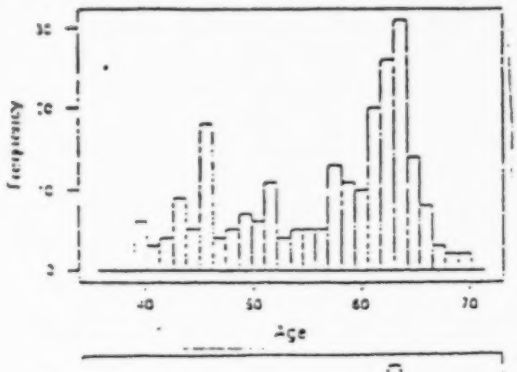
We shall study the termination data for the 1981-1991, the 1981-1984, and the 1984-1989 periods. Although the first two time periods do not exactly mirror the period of the demographics data, they are included for the following reasons: the period 1981-1991 gives a reasonably large data sample that covers the period during which the termination activity is of interest; the 1981-1984 data covers the years preceding and including the plaintiff's year of termination. In our analysis, we will utilize a description of the workforce obtained by averaging the demographic information from the four years 1984, 1985, 1987, and 1989; this should provide a reasonable basis for calculations relating to the 1981-1984 and 1981-1991 time periods.

The distribution of termination ages for the three periods of time under study, 1981-1984, 1981-1991, and 1984-1989 are given below. The distribution for the entire workforce for

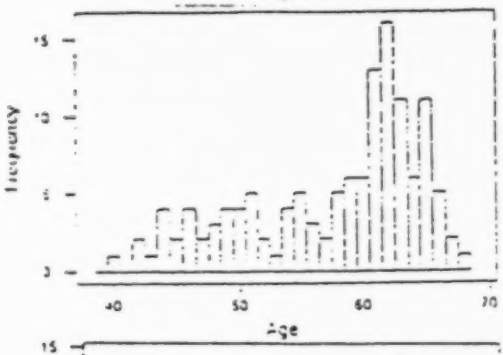
the years 1984, 1985, 1987, and 1989 presented earlier, (64a) of this report, shows bimodal distribution (two humps), where the preponderance of ages are represented by the hump at the left, representing more "younger" managers than "older" managers. The distribution of termination ages below clearly conflict with those (64a), most termination ages correspond to "older" managers

Distribution of Termination Ages for Job Eliminated Managers

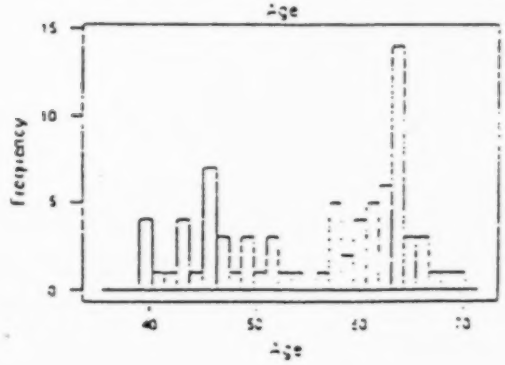
Period:1981-1991



Period: 1981-1984



Period: 1984-1989



The strategy employed in our statistical analysis will be to determine if the distributions pictured above could reasonably have come at random from the age distributions of the entire workforce, pictured on page 4 [64a]. In other words, we will determine statistically whether the ages at termination are statistically consistent with the population age distributions, or whether age was a statistically significant factor in determining the termination age distributions.

Two commonly accepted statistical strategies will be employed. The first will address the percentage of terminees in the "older" age groupings, and will present the likelihood of observing termination percentages as large as those that occurred in these age groupings given the actual percentages in the entire age 40-69 workforce. This approach essentially turns the information given in the distributions above into categorical data, where, for example, an individual is classified as either 55 or above, or below 55. The information that we analyze is the percentage of managers in such categories. This approach is the one undertaken in section **(a)** below. The second approach addresses the termination age distributions in a continuous fashion, and asks how likely it is that the sample of termination ages actually occurred at random from the entire distribution of age 40-69 workforce ages. This approach is taken in section **(b)** below.

(a) Statistical Analysis of Termination Age Groupings

The actual percentages of level 9+ managers aged between 40 and 69, for two sets of age groupings, over the four years for which Cyanamid provided analyzable data, are given below:

Percentages of Level 9– Managers Aged Between 40 and 69
Ten Year Groupings

Year	40-49	50-59	60-69	All
1984	781 43.8%	706 39.6%	295 16.6%	1,782 100.0%
1985	838 44.3%	724 38.3%	331 17.5%	1,893 100.0%
1987	991 49.4%	671 33.4%	345 17.2%	2,007 100.0%
1989	1,051 50.0%	680 32.3%	373 17.7%	2,104 100.0%
Average Percent	46.9%	35.9%	17.2%	100.0%

Percentages of Level 9+ Managers Aged Between 40 and 69
Fifteen Year Groupings

Year	40-54	55-69	All
1984	1,129 63.4%	653 36.7%	1,782 100.0%
1985	1,169 61.8%	724 38.3%	1,893 100.0%
1987	1,280 63.8%	727 36.2%	2,007 100.0%
1989	1,396 66.4%	708 33.7%	2,104 100.0%
Average Percent	63.8%	36.2%	100.0%

Between the years of 1981 and 1991, American Cyanamid terminated 237 level 9+ / age 40+ employees for the reason "job eliminated", 131 of these employees were terminated between 1981 and 1984, 77 were terminated between 1984 and 1989, the period for which we have demographic data. The demographic data clearly indicates that about 17.2% of the age 40-69 population was between 60-69 over those years. The table below indicates that the percentage of the age 40-69 level 9+ employees who were terminated for the facially job-neutral reason "job eliminated" between the ages 60-69 ranged from 48.9% to 54.2% depending on which period of years is considered. This is substantially higher than the 17.2% that would be expected if "job eliminated" were a truly age-neutral reason for termination.

Accordingly, we use the binomial distribution (as described in our first report) to determine statistically whether the termination percentages experienced are consistent with the overall percentage in the age 40-69 population, and thus likely to have occurred at random. If we conclude that these did not occur at random, we must conclude that age was a statistically significant factor.

How likely is it that one would observe such large termination percentages for the 60-69 year olds? The chance that as many terminations in the 60-69 age group as were observed for any of the three time periods occurred at random, given that the percentage of 60-69 year olds in the age 40-69 level 9+ workforce was 17.2% is less than 1 in ten trillion!

Likelihood of As Many Termination in **60-69** Age Group as Observed, Assuming "Job Elimination" To Be Age-Neutral

	Tot. No. Term.		% of Term.	Chance of as Many
Range of Years	40-69 Group	60-69 Group	60-69 Group	Term. 60-69 Group As observed
1981-1984	131	71	54.2%	<1 in ten trillion
1981-1991	237	116	48.9%	<1 in ten trillion
1984-1989	77	38	49.4%	<1 in ten trillion

A similar analysis for the 55-69 age group leads to similar results. The percentage of age 40-69 level 9+ managers in the Cyanamid workforce over the years 1984, 1985, 1987, and 1989 who were 55-69 averages 36.2%. The table below shows that the observed percentages of terminations for "job eliminated" in the 55-69 age group ranged from 59.7% to 70.2%, all much higher than the observed average of 36.2%. The likelihood of observing such high percentages of terminations, assuming "job eliminated" to be age-neutral is virtually zero for the larger pool of data from 1981-1984 and 1981-1991, and about two in one hundred thousand for the 1984-1989 termination data.

Likelihood of As Many Termination in **59-69** Age Group as Observed, Assuming "Job Elimination" To Be Age-Neutral

Range of Years	Tot. No. Term. 40-69 Group	Tot. No. Term. 55-69 Group	% of Term. 55-69 Group	Chance of as Many Term. 55-69 Group As observed
1981-1984	131	92	70.2%	<1 in ten trillion
1981-1991	237	150	63.3%	<1 in ten trillion
1984-1989	77	46	59.7%	.0000225

(b) Statistical Analysis of Ages at Termination

For the four years for which we have demographic data, the average ages for the 40-69 year-old level 9+ workforce, together with the standard deviations of the age distributions, are given in the table below.

Age Statistics, Entire Age **40-69** Workforce

Years	No. of Level 9+ Managers	Mean Age	Standard Deviation
1984	1782	51.703	7.392
1985	1893	51.857	7.502
1987	2007	51.395	7.673
1989	2104	51.303	7.679
Overall		51.565	7.562

The means and standard deviations of the termination ages for employees terminated for the reason "job eliminated" in the three year periods 1981-1984, 1981-1991, and 1984-1989 are given below.

Age Statistics, Age **40-69** Terminations

Range of Years	No. of Level 9+ Managers Term.	Mean Age	Standard Deviation
1981-1984	131	58.134	6.970
1981-1991	237	56.786	7.977
1984-1989	77	56.185	8.763

Notice that the mean termination ages for these three periods substantially exceed the mean ages for level 9+ managers in the age 40-69 workforce in the years under consideration, mirroring the information in the preceding graphs. If the reason "job eliminated" were truly age-neutral, then the terminations for this reason would have occurred at random, and so the mean termination age for the terminated managers should be close to the mean for all managers in the 40-69 workforce.

Since we do not have demographic information for the entire 1981-1991 period, in what follows we will consider only the terminations that occurred between 1984 and 1989. If these terminations were truly age-neutral, then the termination ages should constitute a random sample from the entire population of ages. We will consider the entire population of 40-69 ages between 1984 and 1989 to have mean 51.565, the average of the means for the four years, and standard deviation 7.562, the average of the standard deviations for the four years.

With this information, it is statistically possible to do two things to determine whether the observed distribution of termination ages is consistent with the entire distribution of ages in the age 40-69 workforce, or whether other factors affect the difference in the distributions. First, one can calculate an interval which, with a high amount of confidence, is likely to contain the sample mean (such an interval is called a *confidence interval).* If the computed interval does not contain the sample mean, then we conclude, with given confidence, that the sample was not randomly chosen from the population. The second approach one can take is to statistically "test" the hypothesis that the sample was

randomly chosen from the given population. Here one computes the "statistical significance" of the result.

We begin by computing an interval within which the sample mean should fall with high confidence. For this particular workforce age distribution, the mean of the 1984-1989 termination ages should fall within 2.59 years of the mean age of the population, and this holds with confidence 99.73%. With confidence 99.994%, the mean of the sample should fall within 3.45 units of the mean of the population. Note that this does not even come close to happening. The mean age for the sample of terminated managers, 56.185, is 4.62 years above the overall mean age of the 40-69 year-old workforce, namely 51.565.

The statistical test described earlier allows us to conclude that the risk of being wrong if we assert "the termination ages between 1984-1989 are ***not*** a random sample from the ages of the entire aged 40-69 workforce" is .0000000828, or less than one in ten million. In other words, when we test the claim that the sample mean is reflective of a random sample from the entire age 40-69 age distribution, we reject this claim at the .0000000828 significance level. This means that it is extremely improbable that the terminations occurred at random, without regard to age. This is an extremely significant statistical result.

With extremely high confidence, we conclude that the termination ages of the 77 managers terminated between 1984 and 1989 do not result from a random selection from the population. In other words, with very high confidence we conclude that the "job eliminated" is not age-neutral.

Conclusion

At a descriptive level, the demographic data for the years 1984, 1985, 1987, and 1989 suggest that the expected natural aging of the workforce did not occur. The percentages of the managers in the 50-59 age grouping showed a marked decrease relative to projections based on 1984 demographics.

In the light of the actual demographic data, the statistical evidence suggesting that the termination reason "job eliminated" is not age-neutral is now extremely compelling. The statistical likelihood of observing as many terminations in the 60-69 and 55-69 categories as were observed over three time periods of interest is virtually zero. Furthermore, the age distribution for managers terminated between 1984 and 1989 is statistically extremely inconsistent with the demographic age distribution data provided by Cyanamid, which indicates that age was a statistically significant factor in these terminations.

We conclude with a high degree of statistical certainty the "job eliminated" was not an age-neutral termination reason.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ARTHUR HOLLANDER

CIVIL ACTION NO.

Plaintiff, B-85-481 (WWE)

v.

AMERICAN CYANAMID COMPANY

April 23, 1997

Defendant.

AFFIDAVIT OF ARTHUR HOLLANDER

Note: The Portions Of This Affidavit Which Are Outlined In Black-Line Were Striken From Consideration By The District Court. *See* 20a Infra.

1. I am the plaintiff in this age discrimination and tortious interference action. I am over eighteen (18) years of age, I believe in the obligation of an oath, and I make this Affidavit on my personal knowledge and belief. I submit this Affidavit and Appendix in opposition to defendant American Cyanamid Company's ("Cyanamid" or "defendant") motion for summary judgment. I hereby certify that all documents submitted in Plaintiff's Appendix ("Pa -#" are true and genuine copies of the original documents.

2. By Order dated March 23, 1989 the Court dismissed this action on the grounds that I failed to submit sufficient evidence that defendant's stated reason for my termination -- i.e. that my management style was allegedly abrasive, abusive, and deceitful -- was false and pretextual. "[P]laintiff

provides no credible evidence to suggest a nexus between his age and discharge ... He has failed to produce deposition testimony of one single witness who is willing to state that his management style did not have the effect of alienating a portion of his coworkers ... " (March 23, 1989 Order, Defendant's Appendix, "Da" Ex. "FF".)

3. The March 23, 1989 Order was reversed and the action remanded for additional discovery. The discovery establishes evidence of pretext and should afford me the opportunity of a jury trial.

4. The new evidence includes:

(a) Affidavits from my former co-workers attesting to my cooperative and positive management style. (Affidavits of W. Mark Haskew, William Seiden, John Stark, PhD. and Elise Espositio Devine, Pa 001 to 010.) These individuals praise my management style voluntarily, without pressure or incentive (other than to speak the truth). Cyanamid's witnesses (as detailed below) are not independent, lack first-hand knowledge, and provide no support or substance to their conclusory criticism of my management style.

(b) Working files of American Cyanamid Company which, contrary to the conclusory statements in my Progress Reviews, establishes my status as a cooperative and civil manager, including:

i. Documents endorsing my engineering team, which could have been readily replaced with external consultants.

ii. Complimentary letters from internal "clients" at Cyanamid

iii. A history of receiving leadership roles in important, multi-million dollar projects which Cyanamid would

have never risked entrusting to an allegedly abrasive and uncooperative manager, and

iv. A progression of promotions, raises, stock option awards and performance bonuses which belie Cyanamid's claims of major deficiencies in my management style.

(c) Statistical evidence establishing that Cyanamid wages a decade-long campaign to shed a large population of older managers and to conceal the reasons for discharge with false, pretextual explanations to conceal a policy of age bias.

5 When subjected to searching scrutiny, as detailed herein, Cyanamid's claimed reason for my discharge collapses as false and unsupported. Accordingly, Cyanamid's motion should be denied.

The Role Of Management Engineering

6. I was employed by Cyanamid for 15 1/2 years within three (3) divisions: Plastics & Resins Chemical Division (4 1/2 years), Lederle Pharmaceutical Division (8 years), and Davis & Geck Division (3 years). I was advised of my termination in January, 1984 at age fifty-eight (58) and my severance ended in July, 1984.

7. I served Cyanamid in the function of "Management Engineering" as an internal consultant to investigate, analyze, develop and recommend improvements in the operation of various work units in the company in order to improve their economic performance. After reviewing a "client" department, my team prepared a report recommending changes to the subject operation. The management of the internal client could choose to implement some or all of the recommendations, frequently with my assistance.

8. I was regularly requested to return to outside departments to help improve different areas of their business, including eight (8) projects in the Danbury Suture facility and four (4) in Marketing. (Index of Projects @ Pa 011.)

9. Cyanamid's internal working records (contrary to the Progress Reviews prepared at the end of my tenure) establish that my engineering efforts were cooperative, effective and well-regarded. For example, by Memorandum dated November 21, 1979, B.R, Putnam, Director of Cyanamid's Cost Reduction Committee, requested that Committee members comment upon the use of outside consultants for cost-reduction projects. (11/21/79 memo @ Pa 012.) In response, R.B. Johnson, Lederle Vice President (and the supervisor directly above my immediate superior Bob Brewster) responded, "Our previous experience with external consultants for cost reduction has not been too encouraging ... in place of outside consultants, we have developed a staff of our internal consultants (Management Engineering) to undertake major programs. Their technique has encompassed work measurement as well as automation techniques. *This combination* has been accepted in all our plants." (11/7/79 Memo @ Pa 013, emphasis supplied.)

10. From time to time I received letters complimenting my efforts in the Management Engineering function which (unlike Progress Reviews) were voluntarily prepared and sent to me in genuine praise of my efforts. A sampling of these documents includes: (a) May 11, 1977 Memorandum thanking me for completing "a very thorough and adequate study of our quality control function in Danbury." (Pa 014), (b) Memorandum dated October 8, 1979 giving "thanks and appreciation for the important role you played in developing a recommended approach to the P. & C. A. Data Processing System." (Pa 015), (c) Letter dated January 28, 1982

praising my "outstanding job in making your presentation to the Office of the President" and "the part you played [making] the total Danbury facility look good")pa 016), and

(d) Letter dated January 21, 1983 praising my "excellent presentation to the Office of the President" (pa 017).

11. I an aware of no working documents (i.e. business records outside of my personnel file) criticizing my management style or performance. Cyanamid's working records -- contrary to the documents prepared by Cyanamid for my termination and this litigation -- squarely contradict defendant's allegations that severe "interpersonal problems' compelled my discharge.

History of Major Work Assignments

12. From when I was re-hired by Cyanamid in 1973 (my earlier tenure had ended in June, 1960) I enjoyed a career with regular promotion and ever-increasing major job responsibilities. (History of Salary Increase, etc. @ Pa 052.) I received regular increases in salary, performance bonuses and stock option awards. (Notices of raises, bonuses and stock options awards, Pa 053-110.)

13. On March 2, 1981, I was promoted by Davis & Geck to Manager, Medical Device Manufacturing, with an increase of one (1) grade Level and a "$6,500 salary increase, the largest of my career. (Organization Notice 2 Pa 019) At year-end I received a performance bonuses of $5,150.00, my largest ever. (Bonus Notice @ Pa 103.)

14. In this new position, my primary responsibility was to support the manufacturing of new medical devices in a consulting function. (1981 Progress Review, Da Ex. "DD".)

15. I was assigned to the "Hemostat Project", a joint venture between Cyanamid and International Paper to

develop the manufacturing equipment to produce an absorbable pad designed to stop bleeding in surgery. The project involved a financial commitment by Cyanamid of over $30 million .

16. I worked very closely with International Paper's leader on the project, Dr. John Stark, the inventor of the hemostat. Dr. Stark testifies that I "did an excellent job for Cyanamid and [he] was shocked to hear that [Hollander] was fired." (Stark Afft. ¶ 8 @ Pa 010.)

17. The relationship with Dr. Stark was regarded by Cyanamid as highly sensitive and thus critical to the success of the project:

> Though Dr. Stark appeared to be a highly competent and extremely dedicated person, he also appeared to be an extremely nervous and a very sensitive individual. Care must be exercised in working with him. Mr. Hollander appears to have an excellent working relationship with Dr. Stark ... if anything should happen to Dr. Stark, the entire program would be in trouble.

(11/20/81 Memo from Dr. Vincent G. Grosso @ Pa 020.)

18. This major work assignment would never be entrusted to a manager with a history of severs "interpersonal problems."

The "Union Incident"

19. Cyanamid contends that I created "labor discontent" on the Hemostat Project, leading to a union vote which was unsuccessful only after I was removed from the project. (Cyanamid Brf. @ p. 9). This claim is false and unsupported: there is no document or pre-litigation record supporting Cyanamid's claim that I caused the "union incident", the testimony of Cyanamid's witnesses is speculative hearsay,

and the first-hand witnesses dispute Cyanamid's account. (Devine Afft. ¶ 5 @ Pa 001A; Stark Afft. @ Pa 010.)

20 Cyanamid's witness John P. O'Shaughnessy is an employees of the Personnel Department who did not work at the International Paper job-site and has no first-hand knowledge of the workings of the project. His vague testimony of "dissatisfied" workers is conclusory hearsay, and he produces no records of grievances received in his department. The Affidavit of Richard Augsbach (Da, Ex. "N") vaguely refers to "poor morale", but does not identify me as the source of such problems, nor identifies the employees allegedly dissatisfied with my management.

21. My supervisor Robert Duckett testified that "Bill Mays", the "personnel manager" from Pearl River, came to the International Paper work-site to investigate this alleged incident, but no report has ever been produced. (Duckett Dep., day 3, 3-16 to -25 @Pa 134.) (I have no recollection of Mr. Mays' alleged visit.)

22. Mr. Duckett had no knowledge about the specifics of my allegedly improper actions, other than his general belief that "Mr. Hollander's handling of some of the employees there possibly contributed to the petition for union election." (Id. 15-1 to -7 @ Pa 135.)

23. Robert D'Andrea, when pressed for specifics, reveal a void of first-hand knowledge:

Q. What did [the hourly employees] indicate about [Hollander's] lack of control?

A. He did not have any, It was out of control.

Q. What was out of control?

A. His management of the people at that particular site.

Q. Why was the fact that they petitioned for a union election any indication of lack of control?

A. It underscores possible supervisory practices that may not be uniform, a discontent with whatever was happening at I.P. at the time.

Q. Anything else?

A. No, Generally that's why people petition. They feel there is a need for a better say that what was occurring.

Q. What was non-uniform about the supervisory practices?

A. This was in general what people petition for. Specifically what was happening up there I cannot relate to because I was not involved from that point on.

Q. Can you identify any supervisory practices of Mr. Hollander which were non-uniform?

A No, I cannot. I had been up there one time and there was just a general -- been up there one time, I guess, in October and there was just a general unrest as to things not being so good.

Q. What things were not good?

A. Supervisory practices.

Q. Can you give me an example?

A. No, I cannot.

Q. Who could?

A. These people that were there, I suppose.

Q. Anybody else?

A. Not to my knowledge, Those people who were involved in the attempt, possibly, but again I was not there.

(D'Andrea Dep. 81-1 to 82-14 @ Pa 112-113.)

24. The testimony of independent witnesses disputes Cyanamid's account. Elise Espositio Devine, Acting Supervisor of the hourly employees at the Hemostat Project, was present (unlike O'Shaughnessy, Duckett or D'Andrea) during the "union incident" - (Affidavit of Elise Esposito Devine @ Pa 001-004.) Ms. Devine testifies that none of the alleged interpersonal problems existed, in fact, I had "a very positive attitude and was cooperative in all aspects". developed a good working relationship with International Paper, and helped the employees obtain permanent employee status and benefits. (Affidavit of Elise Espositio Devine ¶ 3 @ Pa 001.)

25. My role in the Hemostat project does not support defendant's claim that I caused labor unrest. The pre-litigation record establishes that I was only partially responsible for supervising the Hemostat Project's hourly employees: the technicians reported to Dr. R. K. Zawadzki on technical matters and to me on "administrative canons", i.e. personnel issues. (4/19/82 Memo @ Pa 21; see also Devine Afft ¶ 2 @ Pa 001.) Dr. Zawadzki assigned Dr. Don Boop to be the full time-time resident Site Manager, while I was at the International Paper facility one (1) to two (2) days per week. (Devine Afft ¶9 @ Pa 002.) The alleged dissatisfied employees were working for Dr. Boop.

26. I was responsible for developing and installing the manufacturing equipment for the project. Once such equipment was installed, Drs. Boop and Zawadzki directed the efforts of the hourly employees who produced the finished hemostat product. (Devine Afft ¶ 2.) The hourly employees did not work for me. (Id.)

27. Cyanamid does not provide any examples of complaints or deficiencies other than vague claims of labor discontent. Employees may seek to unionize for any number of reason, and a far more credible explanation is that

Cyanamid provided unsatisfactory working conditions, despite my efforts on their behalf. (Devine afft ¶ 5 @ Pa 001A.) In October, 1982, for example, I requested that temporary employees Esposito and Paddock be given full employee status. (8/24/82 memo to R. D'Andrea @ Pa 25.) This request was not approved until over fourteen (14) months later of November 1, 1983. (11/1/83 memo fr. D'Andrea @ Pa 26; see also Devine Afft ¶5 @ Pa 001A.)

28. The hourly workers were paid less than comparable International Paper employees at the same site. I advocated parity in pay for these employees, which was rejected by Davis & Geck Personnel office. Perhaps the workers sought to unionize to obtain fair compensation. (After the union vote was defeated the hourly workers received a $1.00 per hour increase from Davis & Geck.)

29. Cyanamid engaged in improper hiring practices, including requiring that I employ (at the insistence of Mr. D'Andrea) the son of a friend of Gill Seal, Director of Operations at Davis & Geck, even though Acting Supervisor Elise Esposito Devine and I believed he was unqualified. (Devine Afft ¶ 6 @ Pa 001A.) Perhaps the employees attempted union organization to avoid nepotism and to ensure the hiring of qualified workers.

30. Dr. Stark does not complain of any alleged actions which purportedly jeopardized the success of his invention: "[Hollander] did good work which resulted in an excellent pilot facility at International Paper Corporate Research Center and economic estimates of a full scale production facility." (Stark Afft ¶¶ 7-8 @ Pa 009-010.) Dr. Stark "never questioned Mr. Hollander's competence or dedication to the task. Mr. Hollander did an excellent job for American Cyanamid and I was shocked to hear that he was fired." (Id.)

31. In mid-November, 1983 -- at the height of the alleged labor unrest -- Davis & Geck President K.F. Wilson came to the International Paper worksite for an inspection tour. Mr. Wilson's follow-up letter to Dr. Keith Hall, Director of Research and Development for International Paper, confirms that his appraisal was entirely satisfactory, "We are most appreciative of your cooperation and effort regarding the production of the hemostat and feel the payoff will be mutually beneficial." (11/11/83 letter from K.F. Wilson @ Pa 042.)

32. Mr. Wilson found the project to be ahead of schedule: " .. we are on the pathway for early market release." (Id.) Mr. Wilson thus contradicts Gill Seal's claim in his deposition that the Hemostat Project was behind schedule. (Seal Dep. 44-19 to -24 @ Da Ex. "G".)

33. The criticisms of my performance in the Hemostat Project are not supported by the working records of the company, nor the testimony of Cyanamid's alleged "witnesses", to the labor unrest, nor any reasonable construction of the events and circumstances. The testimony of Dr. Stark and Ms. Devine -- the only witnesses with first-hand knowledge -- contradicts Cyanamid's version of the events.

34. A reasonable jury could readily reject Cyanamid's vague and unsupported claims that the alleged "union incident" was my fault, that it had anything to do with my termination, or that it was a genuine basis for my discharge.

The "Safety Incident"

35. Cyanamid contends that in June of 1983, I frustrated and interfered with the Safety Audit of the Hemostat Project conducted by Sumner Kaufman. (Cyanamid Brf. @ pp. 9-10; see also in a Statement of Sumner Kaufman, Cyanamid

Ex. "P") Although I will address the details of this issue herein, this criticism is utterly contradicted by the "consistently acceptable" rating I received for "safety consciousness and actual performance" in my 1981, 1982 and 1983 Progress Review, and "superior in 1980. (Da exs. "F', "J". "R", & "DD".)

36. There is no contemporaneous business record (as is typical of Cyanamid's defense) establishing the alleged interference with Mr. Kaufman's safety efforts. Moreover, Mr. Kaufman's testimony establishes that this alleged "incident" has taken on inflated importance to suit Cyanamid's defense:

Q. Did Mr. D'Andrea come around and ask you to make a statement?

A. I was asked -- well, I was asked if I would make the statement, and I did.

Q. Why were you asked?

A. I have no idea.

Q. It was D'Andrea who asked you?

A. To the best of my recollection. It came as a surprise, I've got to admit.

Q. Why was that?

A *I didn't think I could off anything of significance to the situation.*

Q. Did you tell that to Mr. D"Andrea?

A. Uh-huh.

Q. What was his response?

A. "Well it may be of some value, so please do."

Q. Did he tell you what he wanted you to give a

statement about?

A. I think he asked if I could recall any incidents involving my relationship with Art Hollander, and this was the most significant and so I did.

(Kaufman Dep. 36-10 to 37-7 @ Pa 115-116; emphasis supplied.)

37. Cyanamid claims that I frustrated and interfered with a safety inspection of the Hemostat Project. Cyanamid has not produced a copy of Mr. Kaufman's report and I have not been able to obtain one. My recollection of the report is that it contained no statement about the alleged lack of cooperation nor the claimed breakdown in communication which allegedly jeopardized safety.

38. Mr. Kaufman's complaint that I "by-passed" him and his department is utterly false. (Kaufman Stmt., Da Ex. "P".) In a Memorandum dated August 22, 1983 I prepared a careful and professional response which seriously considered and adopted Mr. Kaufman's recommendations. (8/22/83 Memo @ Pa 039-041.) I outlined proposed channels of communication to ensure that a procedure was in place to address safety issues in a timely manner. (Id.) My responsive memorandum concludes: "Mr. Kaufman's Audit is well-taken and every effort will be taken to conform to proper Cyanamid's S.O.P.'s safety, industrial hygiene, environmental and GMP's." ((Id. @ Pa 041).

39. The memorandum was transmitted to Robert Duckett my immediate supervisor and simultaneously copied to Mr. Kaufman. I believe this to be correct procedure. There is no record of any complaint that I did not act properly in all respects until after I brought this action.

40. It is a mystery how Mr. Kaufman would take offense to my response: I carefully addresses and adopted his comments, I supported his audit as "well-taken", and most

importantly, he deemed the whole incident to be insignificant until pressed by Cyanamid. (Kaufman Dep. 36-16 to 37-7 @ Pa 115-116.) [1]

41. In a November 18, 1983 memorandum outlining my 1983 accomplishments and 1984 goals (prepared in anticipation of my 1983 Progress review) I reiterated my commitment to implementing the recommended safety program:

Pearl River Safety personnel having inspected the facility and recommended interim and long-term requirements. Actions have been implemented for interim operation. Long-term will be completed in December 1984.

(11/18/83 Memo from Hollander to Duckett, @ Pa 043-047.)

42. Where the business records arising from Mr. Kaufman's safety audit establish that I cooperated with his efforts and adopted his recommendations, a Jury could readily reject the exaggerated significance Cyanamid now attaches to this "incident."

The Progress Reviews and Duckett's Testimony

43. No working business records establish my alleged "interpersonal problems" (e.g. grievances by hourly employees at the Hemostat site, records of alleged safety problems, warnings from my supervisor about particular incidents, etc.).[2] Cyanamid relies heavily upon my Progress

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[1] I cannot respond to vague, self -serving claims that I acted like "Gestapo" or my presence spelled a "black day at Davis & Geck. (Cyanamid Brf. @ pp. 5-6.) Cyanamid's defense ultimately relies upon pure innuendo about my alleged reputation. Whenever tested, Cyanamid;s witnesses rely upon hearsay or fail to remember specifics.

[2] Mr. Duckett's June 12, 1982 memorandum is not an operational business memorandum. (Da Ex. "K".) This self-serving document was

Reviews, particularly those for 1982 and 1983, to establish the purported problems with interpersonal relations which ultimately compelled my discharge.

44. Throughout my Cyanamid career, I was criticized in my performance evaluations for needing improvement with "communication" and "human relations". (see e.g. 1977 Progress Review, Da Ex. "D".) I nevertheless received overall above-average evaluations: 1973, 1977, 1978, 1980 and 1981, "excels in Several Major Areas."

45. Each year I expected to be told that I needed improvement in at least one (1) area. When I prepared performance reviews for my subordinates, I was instructed by my supervisors to find an area which required improvement. The area of inter-personal skills was chosen in this fashion for me. The alleged need for improvement in interpersonal skills did not, however, impede my overall above-average ratings.

46. I received ever-increasing work responsibilities, regular promotions, raises and performance bonuses. (Pa 053 - 110.) The alleged problems with interpersonal relationships never threatened my continued employment -- in light of my overall quality performance and the undisputed success of my projects -- until I reached my mid-fifties.

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slipped into my personnel file and I never received a copy. The memorandum typically mischaracterized the circumstances, but in any event, Cyanamid does not claim that I was terminated for "insubordination." (Id.) Jurors could readily deem this document to be an obvious attempt by defendant to create a "paper trail" to justify my eventual termination.

47. I was reviewed three (3) times by Robert Duckett, my supervisor who held a position of Director of Manufacturing in Davis & Geck. In 1981, Mr. Duckett wrote, "he has worked well with contract manufacturers and R + D to resolve many start up problems with the skin stapler. He can be more effective by developing a better rapport with the R + D department." (1981 Progress Review, Da Ex. "DD".) I nonetheless received the overall rating "Excels in Several Major Areas" - (Id.)

48. The 1982 Performance Review showed a sudden shift in Mr. Duckett's criticism of my human relations skills. "Unfortunately, several projects are not getting proper attention because of interpersonal relationship problems. He was taken off the Skin Stapler Project for this reason ... " (1982 Progress Review, Da Ex. "J".)

49. I was never "taken off" the Skin Stapler Project. Cyanamid has never produced any business record establishing that my responsibilities in this area were removed, that I was replaced by another engineer, or that some other adverse action was taken against me.

50. My efforts on the Skin Stapler Project were successfully completed. In late 1981/early 1982, Cyanamid had voluntarily recalled the Skin Stapler from the market due to staple-closing deficiencies. I was assigned the task of devising a plan to cure the defects, and in a proposal dated March 22, 1982, I presented a "re-entry program" to fix the problems. (3/22/82 memo. @ Pa 021.) In a memorandum dated March 30, 1982, I advocated the Manufacturing Department's (but not necessarily my) participation in implementing these changes. (3/30/82 memo. @ Pa 024.) The Research Department declined (as was its prerogative), but the project ran into trouble again (thus vindicating my earlier advice to keep Manufacturing involved). I was called upon to return to the Skin Stapler in June, 1982, whereupon

I generated a new set of recommendations for fixing the problems. (6/3/82 memo @ Pa 033.)

51. The June, 1982 recommendations were implemented and the "re-entry" program for the Skin Stapler was a success. The Skin Stapler became a "purchased item" again, i.e. a product ready for regular production. My work was completed and I moved on to other projects, including the Hemostat.

52. The alleged problems with "other projects" were never explained and, in any event, I ultimately received the overall rating "Achieves Expected Results" for 1982. (Da Ex. "J".)

53. The 1983 Performance Review was even worse, and presented a blistering criticism of my alleged misconduct:

> He leaves a "trail of wreckage" of interpersonal and interdepartmental relationships which eventually inhibit the success of the projects. He seems to ignore the vital "people function" almost completely and doesn't comprehend this effect. He operates like a "one man gang" which is not acceptable in a complex, multi-functional team oriented business.

(Da Ex. "R".)[3]

54. One would expect Mr. Duckett to be able to provide specific examples of the conduct which left the "trail of wreckage" by a "one man gang". Mr. Duckett instead suffers from a total lapse of memory:

* Duckett could not recall the evaluation criteria he used to rate Hollander in 1983. (Duckett Dep. 147-16 to -19, Pa 118.)

* Duckett could not recall a single goal which was not met in 1983, and nothing or no one could

refresh his recollection. (Id. @ 184-10 to 186-2, Pa 119-121.)

* Duckett could not remember if "specific people" complained of alleged interpersonal problems. (Id. @ 187-13 to -16, Pa 122.)

* Duckett could not recall anything about "the way [Hollander] handled the projects that caused the problem." (Id. @ 188-8 to -17, Pa 123.)

* Duckett could not recall anyone reporting poor relations with International Paper. (Id. @ 198-13 to -19, Pa 125.)

* Duckett could not recall anything which Hollander failed to accomplish in 1982 and 1983 due to the interpersonal relations issue. (Id. @ 202-13 to 203-4, Pa 126-127.)

* Duckett could not identify any projects "slowed up" by the alleged internal friction caused by Hollander. (Id. @ 203-10 to -14, Pa 127.)

* Duckett could not recall details of why Hollander was allegedly taken off the skin stapler project. (Id. @ 204-15 to -20, Pa 128.)

* Duckett could not recall that "interpersonal problems" led Hollander being taken off the skin stapler. (Id. @ 206-3 to -7, Pa 130.)

* Duckett could not recall the "impact" of Hollander's interpersonal problems. (Id. 206-14 to -17, Pa 130.)

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3 Even at this point my overall evaluation was "needs improvement", and not "consider for termination". (Da Ex. "R'.)

* Duckett could not recall whether Hollander encountered any difficulty in discharging his responsibilities on the Hemostat Project. (Duckett Dep., day 3, 9-24 to 10-2, Pa 132-133.)

The unsupported and conclusory criticisms in my 1982 and 1983 Progress Reviews collapse as soon as Duckett is called upon for specifics.

55. In a rare attempt to specify the allegation of "interpersonal problems", Duckett claims there were "problems" between myself and International Paper's research personnel Drs. Kaganov and Stark. (Duckett Dep. 188-21 to 189-1, Pa 124-125.) Cyanamid does not offer Dr. Kaganov's testimony to corroborate this allegation, and Dr. Stark's Affidavit contradicts Duckett's claim! (Stark Afft @ Pa 009-010.)

56. In a Record totally devoid of specifics, Jurors could readily dismiss the conclusory criticisms of my performance as false, unsupported and pretextual.

Cyanamid's Witnesses

57. In light of Duckett's inability to provide specific examples supporting his decision to discharge me, Cyanamid shores up its defense with the testimony of five (5) witnesses (O'Shaughnessy, D'Andrea, Matkovitch, Seal and Kaufman) who did not work with me on a day-to-day basis nor have first-hand knowledge of the alleged incidents triggering my discharge.

58. John P. O'Shaughnessy's (Personnel Director of Davis & Geck) contact with me was occasional and indirect at best. The entire support for his claim that I am responsible for the alleged "union incident" is that "I recall, I think, it was six to eight or ten people who worked there

who were dissatisfied with the direction in management they were receiving from Mr. Hollander to the point that they had petitioned for a union to represent them" (O'Shaughnessy Dep. 174-22 to 175-1 @ Pa 127-128.) The testimony of the alleged disgruntled employees is conspicuously absent, and the Devine Affidavit flatly contradicts O'Shaughnessy's claim. (Devine Afft ¶ 7-10 @ Pa 002-003.) (See also, ¶¶ 19 to 34, above.)

59. Mr. O'Shaughnessy's claim in his deposition that I withheld an engineering report on the cafeteria operation is an outright lie. (O'Shaughnessy Dep. 176-9 to 177-17 @ Da Ex. "M".) I never prepared a management engineering report evaluating any cafeteria operation. I challenge Cyanamid to produce a copy of the alleged report.

60. Robert D'Andrea (an employee of the Davis & Geck Personnel Department) likewise had no day-to-day involvement in my work. His testimony about the "union incident" is speculative hearsay. (See ¶23, above.)

61. Mr. D'Andrea's claim that I misled him about a fighting incident at the Hemostat Project simply makes no sense. (Sworn Witness Statement, Da Ex. "Q".) I did not mislead him and, in any event, the workers involved were employees of International Paper. Mr. D'Andrea had no authority to discipline or terminate them! The matter was, in any event, resolved to everyone's satisfaction, whereas terminating our only two (2) hourly workers would have seriously delayed the Hemostat Project.

62. Sumner Kaufman's vague criticisms of my actions are not supported by any factual details, such as the project at issue, the location, relevant dates, or any other substance. (Kaufman Dep. 39-1 to -25, Da Ex. "H".) Mr. Kaufman's claim that I altered meeting minutes is false and Cyanamid never produced the minutes at issue. (Id.) (I do not recall

ever keeping minutes.)

63. George Matkovitch's principal complaint against me is that my efforts were endorsed by Mr. Duckett and higher management! Mr. Duckett instructed Matkovitch, "You listen to what Art has to say", and "shut up and listen to Art." (Matkovitch Dep., 45-8 to 47-5 @ Pa 140-142.) Matkovitch reported to Duckett (and not to me) and testified that I was acting with the approval of Mr. Duckett and his superior Al Smith. (Id., 47-10 to 49-12, 52-18 to -24 @ Pa 142-145.) "The way he behaved, he led us to believe that he has management's support, *which I think he did*, so we just had to shut up and not argue with him." (Id., 54-21 to -23 @ Pa 147, emphasis supplied.) Mr. Matkovitch's resentment of management's endorsement of my efforts is of no concern in this case, except to undermine every claim Cyanamid makes about my performance.

64. Gill Seal conceded that he had no knowledge of the facts underlying my alleged lack of cooperation with Research and Development, and deferred to the first-hand witnesses at the jobsite. (Seal Dep. 57-17 to -24, Da "G".) The rest of his criticisms of my performance were acquired at a cocktail party! (Id., 59-14 to -12, Da "G".)

65. When stripped of the hearsay, innuendo, and gratuitous claims, defendant's allegations contradicted by its own records and the independent witnesses. Cyanamid's claim that I was terminated for cause is revealed as false and pretextual.

The Relevancy Of Statistical Analysis

66. From 1981 to 1991, Cyanamid waged a campaign to systematically eliminate older management personnel from its workforce and to conceal this practice by explaining the terminations with false, pretextual reasons. This policy was

accomplished in part by terminating older managers and explaining their terminations with the label "job eliminated."

67. Cyanamid's contention that the "job eliminated" statistical analysis is "irrelevant" assumes as gospel truth the reasons given for my termination. As detailed above, I vigorously dispute Cyanamid's claim that "interpersonal problems" compelled my discharge, and a wealth of evidence contradicts these claims. Having presented sufficient evidence to destroy the credibility of the reasons given for my termination, it is instructive to determine whether Cyanamid executed a broader policy of terminating older managers on phony grounds.

68. The statistical evidence is relevant for the following reasons:

(a) Cyanamid's practice of eliminating older manager provides the context of the circumstances of my termination. My discharge cannot be viewed in isolation from the waves of older managers terminated between 1981 to 1991 for a variety of stated reasons. The "job eliminated" category is merely the largest sample and most appropriate for statistical analysis.

(b) Cyanamid's practice of deceitful concealment of the true reason for large numbers of terminations undermines the credibility of the alleged reasons for my termination. Moreover, this pattern evidence eliminates the possibility that my termination was a mere error of business judgment. Assuming that the Jury rejects Cyanamid's reasons for my discharge -- concluding that they are false and pretextual -- the pattern evidence bolsters the conclusion that age bias was the true reason.

(c) Cyanamid puts my general business honesty in issue -- Hollander had a "poor reputation", "he was seen as deceitful", he had a "tarnished reputation", and he engaged in the practice of "duplicity while at Cyanamid". (Cyanamid Brf. @ 6, 7, 13) -- and thus invites broad scrutiny of the integrity of its own practices.

The Statistical Evidence

69. The statistical analysis consists of two general areas"

(a) The Report of Prof. Marie Gaudard establishes that the purportedly age-neutral "job eliminated" terminations disproportionately impacted older managers, and

(b) A year-to-year comparison of Cyanamid's World-Wide Personnel Directories establishes that job allegedly "eliminated" in fact survived with the same or a similar title and in the same reporting structure.

70. In general terms, between 1981 to 1991, Cyanamid experienced extraordinary turnover in its staff of management personnel. Cyanamid produced in discovery lists which show a total of more than 1300 terminations of management employees age 40+/ Level 9+ (known as "similarly situated" employees). (Termination Lists @ Pa 296 to 349.) This group includes 242 similarly situated employees terminated in 1991 alone. (1991 List @ Pa 325.)

71. Each year Cyanamid published a "World Wide Personnel Directory" listing the "key" management personnel throughout the company, from the Chairman of the Board down to department managers (and excluding non-exempt staff, union employees, and lower-level administrative and clerical staff). The February, 1984

Directory lists 1,347 management personnel. (Excerpts from 1984 Worldwide Personnel Directory @ Pa 163-176.) By 1991, 979 of these individuals (73%) were no longer listed. (See High-listed names, Id.) Of the 1,484 management personnel listed in defendant's 1990 WorldWide Personnel Directory, 483 were (32.5 percent) were not listed in 1991, with little or no drop in the total number. (Pa 177-189)

72. From 1981 to 1991, 245 of the discharges of managers age 40+/Level 9+ were explained by Cyanamid as "job eliminated". (summary, Termination Reason by Year and Reasons @ Pa 264-265), It is assumed "job eliminated" is age-neutral (i.e. non-discriminatory) because the term suggests that a work position is eliminated without regard to the terminee's age, and of course Cyanamid denies that it discriminates.

Expert Gaudard's Report

73. Professor Marie Gaudard, PhD., Professor of Statistics at University of New Hampshire, analyzed the "job eliminated" data to determine whether age was a statistically significant factor among the terminees age 40+/Level 9+. (Expert Opinion, Analysis of Job Eliminated Terminations @ Pa 190 -200).

74. When expressed in a "frequency plot", the "job eliminated' terminees are strikingly populated by older managers. (Gaudard Rpt., p.3 @ Pa 192). Dr. Gaudard analyzes the data to determine whether this distribution, heavily weighted against older personnel, happened by chance or because age was a statistically significant factor.

75. Dr. Gaudard determines that, "assuming that 'job eliminated' is age-neutral, we conclude that the observed numbers of terminations are extremely unlikely to have

occurred at random (for age-neutral reasons), assuming a proportions of the entire level 9+ / age 40+ work force age 60-69 was 30% or less, or if the proportion between 55 and 69 was 45% or less." (Gaudard Rpt. @ p.10 @ Pa 199.) [4] For the period 1981 to 1984, even if forty (40%) percent of the age 40+/Level (+ workforce was age 60-69, the likelihood of a random occurrence of the terminations observed in that age group was 7 in 10,000. (Id. @ p.7 @ Pa 196).

76. Dr. Gaudard's analysis becomes all the more compelling when it is revealed that many of the jobs purportedly "eliminate" actually survived.

Were The Jobs Really "Eliminated"?

77. A year-to-year analysis of Cyanamid's WorldWide Personnel Directories reveals the falsity of Cyanamid's claim that the subject positions were "eliminated". [5] In many instances the jobs purportedly "eliminated" actually survived with the same (or similar) title, and fit into the reporting structure formerly occupied by the discharge employee.

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[4] Dr. Gaudard uses hypothetical age distributions in place of the actual age distribution of the employed force because Cyanamid successfully refused to produce such information, known as the "statistical base." (see plaintiff's related motions). It remains a mystery why Cyanamid will not produce a demographic age profile of management force for statistical comparison to the population of managers terminated for allegedly age-neutral reasons.

[5] Cyanamid refused to produce the 1985 and 1986 WorldWide Personnel Directories (years I had not been able to obtain on my own). The secrecy of Cyanamid's widely circulated employee directories has never been explained.

78. The following is a summary of Cyanamid's methods for retaining a job allegedly "eliminated" (with supporting documents in Plaintiff's Appendix):

a. Same Title for Replacement: In six (6) instances (including the case of my purported replacement, Mr. Augsbach), Cyanamid replaced the "job eliminated" terminee with a new employee who received the terminee's identical title and fit into the same reporting structure as the manager eliminate. (Pa 201- 214). In these cases, the replacements were 7, 9, 11, 211, 27 and 33 years younger. (Id.).

b. Synonymous Title Words: In two (2) instances, the job allegedly "eliminated" and replaced by a job with a virtually identical title, and fitting into the same reporting structure. (Pa 215-219). For example, Charles F. Adams' (age 47) position of "Manager New Business Opportunities" was replaced by Dennis J. Salettel (age 40) as "Manager New Business Development." (Id.). In these cases, the difference were -2 and 7 years (Id.)

c. Transposed Title Words: In four (4) cases, words in the "eliminated" job titles were transposed -- e.g. "Manager National Accounts" becomes "National Accounts Manager" -- and the position fits within the identical reporting structure. (Pa 220-229). The age differences are 3, 8 and 29 (twice). (Id.)

d. Adding / Deleting Superfluous Words: In six (6) instances, Cyanamid added or deleted a word which did not change the meaning of the job title --- "Director Licensing and Acquisitions" becomes "Director License and Product Acquisition" -- and otherwise fit within the existing reporting structure. (Pa 230-242). In these cases, the age difference of

the replacements were 3, 4, 5 (twice), 10 and 15 years younger. (Id.)

e. Pre-Termination Title Change: In four (4) cases, the incumbent manager had his title changed shortly before his termination, which title was then restore to the replacement within the same reporting structure. (Pa 243-258). In these cases, the replacements were 20, 23 and 25 years younger (the age of one replacement was not available). (Id.)

f. Pre-Termination Change to Nondescript Title: In four (4) instances, managers with particular job titles had their positions changed to a generic nondescript title immediately proceeding the managers "job eliminated" termination,. (Pa 259-269) This group includes my true replacement Felix Esposito, who in 1987 and 1988 served as "Manager Device Manufacturing." (Id.) In 1989 his title was changed to "Project Manager" and in 1990 he was no longer listed and his job was no longer listed. (Id.)

79. In the foregoing twenty-six (26) examples, derived from a comparison of the job titles and reporting structure in the WorldWide Personnel Directories, reveals that jobs were not "eliminated." The individual occupying the position was terminated and replaced, often with a significantly younger employee.

80. Cyanamid's pattern of falsely explaining terminations of senior personnel is powerful circumstantial evidence of defendant's policy of age bias.

Conclusion

81. The statistical evidence establishes that Cyanamid engaged in a deceitful practice of terminating large numbers of older managers and concealing their terminations with the false reason of "job eliminated." Combined with the evidence that reasons for my alleged termination for cause are greatly disputed, the court should deny defendant's motion for summary judgment and permit the action to proceed to trial.

_____

Arthur Hollander

Sworn to and subscribed before
me this 23 day of April, 1997

signed - Jane L. Kent

Notary Public

Jane L. Kent

Notary Public of New Jersey

My Commission Expires 2/15/99

29 U.S.C. SECT. 623, Prohibition of Age Discrimination

(a) Employer practices: It shall be unlawful for an employer:

(1) To fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or priviledges of employment, because of such individual's age;

(2) To limit segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age: or,

(3) To reduce the wage rate of any employee in order to comply with this chapter.

FRCP - Rule 56 - Summary Judgment

(a): For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after expiration of 20 days form the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or part thereof.

(c) Motion and Proceedings Thereon, The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of

liability alone although there is a genuine issue as to the amount of damages.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall affirmatively that affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial, If the adverse party does not respond, summary judgment, if appropriate, shall be entered against the adverse party.

FRE - Rule 401 - Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

FRE - Rule 702 - Testimony by Experts

If scientific, technical , or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.